

The Honorable John S. Rhoades. . .



currently serves as a District Court Judge for the Southern District of California. His career aspiration as a young undergraduate at Stanford was to become an editor for Time Magazine. Judge Rhoades' interest in

law sparked as he was reading one of his roommate's law books while he was in college. He decided to attend law school at Hastings where he graduated in 1951.

Judge Rhodes started his legal career as a prosecutor. He recalls receiving his first job with the San Diego City Attorney's Office based on a 15-minute interview. He became the Chief Prosecutor at the City Attorney's Office. Then he moved to the Civil Division of the City Attorney's Office where he had his first defense job defending police officers from false arrest claims. He spent some time working for the Tavern Owners Association in which he defended a broad variety of citizens. Judge Rhoades then began practicing on his own in an office that he says was so small that it has now been turned into a broom closet.

Judge Rhoades tried his first case at the San Diego Superior Court level at the location where the San Diego Hotel currently stands. Judge Rhoades was devastated to lose his first case in which a \$13,000 judgment was entered against his client. Despite this misfortune, Judge Rhoades received another case hand delivered the next day from his client. Judge Rhoades began to get so busy that he decided to join with other attorneys and started Holt, Rhoades, & Hollywood, which is now known as Neil, Dymott, Perkins, Brown & Frank. Judge Rhoades persevered through difficult situations to achieve success. Judge Rhoades admitted he was the first defense attorney in San Diego to lose a case with a judgment of over a million dollars. Despite this judgment, insurance carriers saw that Judge Rhoades had the ability to work on big cases and continued to send him more business.

Judge Rhoades' advice to all attorneys is to enjoy themselves more. He would also like to see more camaraderie between plaintiff and defense attorneys. Judge Rhoades emphasizes that preparation is a key to success. He

recommends always thinking three steps down and preparing the other side's case so that you know what you are up against.

In his free time, Judge Rhoades enjoys spending time with his wife Carmel, five sons and numerous grandchildren. One of his favorite hobbies is reading. He reads every type of book and believes lawyers do not spend enough time reading nowadays. Judge Rhoades also enjoys writing and spends some time each year in San Francisco at the Ninth Circuit. He speaks Spanish and enjoys traveling to Mexico. Judge Rhoades served our country as a Naval Officer in World War II.

Judge Rhoades will be honored as the San Diego Defense Lawyers 2003 Honoree at the 2004 installation dinner.

David G. Brown. . .



will be honored at the 2004 SDDL Installation Dinner as the San Diego Defense Lawyer of the Year for 2003.

After graduating from UCLA Law School in 1975, Colonel Brown began his legal career

in the Marine Corps where he worked mainly as a criminal prosecutor and tried several hundred cases. After serving five years in the Marine Corps full time, he moved to the Reserves when he joined the law firm of Neil, Dymott, Perkins, Brown & Frank. Colonel Brown has worked in the Reserves since 1980 and is currently a named shareholder of Neil, Dymott, Perkins, Brown & Frank.

To Mr. Brown's surprise, on July 1, 2003, he received the honor of being chosen as one of approximately 30 newly named Colonels of the Marine Reserves selected among several thousand Marines. Colonel Brown generously served our country in the recent war against Iraq. He spent approximately two years in the CENCOM Region, moving to many different countries including Kuwait, Afghanistan, Ukbekistan, Pakistan, Turkmenistan, Kenya, Egypt, Jordan, and Qatar.

The first time Colonel Brown went to the Middle East was in November 2001, soon after 9/11. He spent approximately 11 months in a Joint Unit working on the detection and prevention of nuclear, biological and chemical high explosives for approximately 11 months.

He returned to the Middle East just before Christmas 2002 and spent another 8 months there until August 2003. The second time Colonel Brown went to the Middle East, he worked as a Ground Watch Officer for the 1st Marine Expeditionary Force Command Element tracking the forward progress of the ground units and reporting to the Commanding General.

Colonel Brown is proud of the American troops for moving approximately 80,000 people and equipment in approximately three weeks the distance equivalent of from San Diego to San Francisco. Colonel Brown is especially proud of the MEFF that he served in for being honored with the Presidential Unit Citation. Such honor had not been awarded to a Marine Unit for approximately 35 years, since 1968. Colonel Brown also wanted to make a point to recognize some of the other San Diego attorneys who served our country in the war, including Colonel William Gallo, Colonel Don Armento, Colonel Frank Thompson, Major David Greenless, and others.

Mr. Brown's 21-year-old son currently attends the Naval Academy in Annapolis, Maryland. His two daughters, 18 and 20 years of age, currently attend the University of Michigan where they both received athletic scholarships for water polo. Mr. Brown said that the hardest thing about being away in the Middle East was missing his daughter's graduation and junior prom and missing many of his daughters' water polo games.

Colonel Brown's advice to all attorneys is to keep your sense of humor and stay humble. He recommended keeping balanced and putting life into perspective. Colonel Brown's experience at war has reminded him to put his life into perspective.

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The Bottom Line

“Man Bites Dog” Two of our own prevail as plaintiff counsel!

Case Title: Roy McCone and Laurie McCone v. Jean Arthur; The Arthur Family Trust, Steve Arthur, et al.

Case No.: GIN 015063

Judge: Honorable Michael M. Anello

Plaintiffs' Counsel: Daniel White, Esq. and Susan Oliver, Esq., White, Noon & Oliver

Defense Counsel: George Andreas, Esq. Law Offices of George Andreas;

Constance Klein, Esq., Law Offices of Constance Klein; Kenneth Lynch, Esq., Law Offices of Kenneth Lynch

Type of Incident: Assault and Battery against the perpetrator; negligent hiring, supervision and retention, premises liability, and other claims against the perpetrator's employers.

Settlement Demand: \$600,000

Settlement Offer: \$301,000

Trial Type: Jury

Trial Length: 12 days

Verdict: The jury awarded (12-0) plaintiffs \$500,000 in the compensatory phase of trial. The jury also found (12-0) that defendants had engaged in punitive conduct. At the start of the punitive phase of trial, the case was settled for a total of \$1,000,000.

Case Title: Bratcher vs. Poway Unified School District, et al.

Case No.: GIN012573

Judge: Honorable Lisa Guy-Schall

Plaintiff Counsel: Jeffrey S. Bakerink, Esq., Law Office of J. Douglas Jennings

Defense Counsel: John T. Farmer, Esq. and Susan I Filipovic, Esq. of Farmer & Case for defendant Ralph Bernal and Daniel R. Shinoff, Esq. and Jeffrey A. Morris, Esq. of Stutz, Gallagher, Artiano, Shinoff & Holtz for defendant Poway Unified School District

Type of Incident: Plaintiff, a teaching aide, claims she sustained severe physical and emotional injuries when she was subjected to sexual harassment from deft. Bernal, a teacher at PUSD. She further claimed she was subjected to retaliation by PUSD and her employment was constructively terminated in violation of public policy. She claimed medicals to date of \$90,893.95, future medicals of \$721,000, lost earnings of \$36,000, requested an award of general damages of “between \$25,000 and \$25,000,000” and a finding of malice and oppression for purposes of a punitive damage award against deft. Bernal.

Settlement Demand: \$800,000, raised to \$1,700,000

Settlement Offer: \$100,000 from deft Bernal (CCP 998) and \$25,000 from deft. PUSD

Trial Type: Jury

Trial Length: 7 weeks, jury out appx. 5 hours

Verdict: Defense

PRESIDENT'S MESSAGE – December 2003



Peter S. Doody

I am rounding the third turn at Del Mar and heading for the wire. Over the past year, it has been an honor and privilege serving as President of San Diego Defense Lawyers. I look back with gratitude for a wonderful and hardworking board, which spearheaded and organized so many events and projects. I would also like to take this opportunity to express deep thanks to our executive administrator, Ms. Sandee Rugg. Without Sandee's incredible organizational skills and polite, but firm, “reminders” SDDL would be far from the first class association it is. This year, collectively, we achieved the ideals and objectives of SDDL, to promote education and fellowship among the civil defense bar in America's Finest City.

Your board has met, your board has voted and I am pleased to announce your 2004 officers: President, Billie Jaroszek, Vice-President Michelle Van Dyke, Secretary Dino Buzunis and Treasurer John Farmer. Billie is a natural leader and one of the hardest working individuals in our association. Next year will mark her fifth year of service as an officer of SDDL. Michelle, always upbeat and positive, was responsible for bolstering our membership ranks through her “can-do” spirit. Dino helped organize many of our events including the golf tournament. He is a friend to all, and is the SDDL de facto Sommelier. John was this year's The Update editor, and through his hard work upgraded the quality of our publication including the “Hot Cases” section. John is a true Renaissance man. In between pulling down defense verdicts, working on our board, and running his own law firm, John plays in a rock-n-roll band and holds a martial arts black belt. The above individuals have selfless dedication and limitless energy and I know will do an outstanding job for you next year. Likewise, the same can be said of two hard working officers and gentlemen, this year's vice-president Bob Gallagher and secretary Clark Hudson. Bob and Clark, many thanks.

This Fall was the busiest time in our organization's history. In October, on behalf of the SDDL I attended the Defense Research Institute (DRI) annual meeting in Washington D.C. for the conclave of state and local defense bar organizations. There, defense bar leaders from around the nation exchanged ideas on how to better serve our members. Although we are a local association, we are on par with most state organizations when comparing membership size and the caliber of our seminars. During this two-day event, several consultants spoke to us on ways to strengthen our various associations. I am happy to report we are firing on all cylinders. Everything these consultants spoke about we are already doing. We have in place a state-of-art interactive website, and an exclusive, members' only, listserv so our members may communicate with one another in confidence. We have a publication which includes a timely synopsis of new cases relevant to the defense bar. We also have a charity drive, which is our golf tournament, as well as a vehicle to introduce upcoming lawyers to our group, the law student mock trial competition. Although we will never rest on our laurels, and will always strive to do better, I left Washington D.C. with a national perspective of SDDL and a newfound pride.

Our busy Fall continued with our annual SDDL Mock Trial Competition which attracted law students throughout California as well as a team from Brooklyn Law School. Board member, Chris Welsh did a Herculean job organizing and running this event. As always the students were well prepared and the competition level high. This year University of San Diego Law School took home the coveted bronze “SDDL Lady Justice Trophy” for the third straight time. This year we wanted to encourage more interaction between the students themselves and the SDDL judges. Thanks to the

efforts of Chris Welsh and Michelle Van Dyke, after two evenings of competition, we hosted a mixer in the lounge at the Emerald Hotel. The cocktail party was well attended and a smashing success. Hat's off to all of you who served as judges for this year's competition. The marathon award goes to Billie Jaroszek who judged Thursday and Friday evenings as well as Saturday morning's semi-finals. The perennial judgeship award goes to board member Ken Greenfield who has consecutively served as a mock trial judge ten years running.

Several weeks after the Mock Trial Competition, we had our second annual SDDL Golf Benefit for Juvenile Diabetes Research Foundation at The Auld Course in Chula Vista. Many thanks to Dino Buzunis for putting this together, pairing the golfers and finding sponsors. I would also like to thank board member Coleen Lowe who with her good friends ran the sign-in desk. It turned out to be a beautiful Friday afternoon of golf, followed by dinner and a cornucopia of great raffle prizes. Board member Sean Cahill donated prizes so valuable we had to auction them off. His autographed Payton Manning football went for \$300 cash! Through our teamwork we were able to raise over \$6,000 for Juvenile Diabetes Research Foundation. Next year, someone will hit a hole-in-one and win that BMW convertible opulently perched above the fifth hole. This fundraiser was made possible by the generosity of our sponsors who are listed in this edition of The Update. I encourage all to show their appreciation and utilize the services of our sponsors.

January 31, 2004 marks the SDDL Installation Dinner where we will honor the 2003 San Diego Defense Lawyer of the Year and also the San Diego Defense Lawyer 2003 Honoree. This year our honoree will be United States District Court Senior Judge, the Honorable John S. Rhoades. Judge Rhoades has always remembered his defense attorney roots and on many occasions has taken time out of his judicial schedule and helped us. As one of my last tasks as SDDL President, I have the honor of introducing the 2003 San Diego Defense Lawyer of the Year. We honor a defense

lawyer who exemplifies the definition of courage, professionalism, commitment and sacrifice. Ironically, this lawyer did not practice law last year, but instead placed his successful trial practice aside, kissed his loving family good-bye and shipped out for Iraq. There, he placed himself in harm's way and served his country. Our 2003 San Diego Defense Lawyer of the Year is Colonel David G. Brown, United States Marine Corps. I cannot think of a worthier recipient.

I look forward to seeing one and all at the installation dinner on January 31, 2004. It has been a wonderful year.

Keep up the good fight.

Peter Doody



Craig Higgs.

32 years civil trial lawyer.
20 years alternative
dispute resolution experience.

619.236.1551

The Bottom Line

Case Title: Tamara Lukeman and Kenneth Lukeman vs. Palomar Pomerado

Health System, dba Palomar Medical Center, Gabrielle Morris, M.D.

Case No.: GIN 012975

Judge: Honorable Lisa Guy-Schall

Plaintiff Counsel: Donald J. Loftus, Esq., The Loftus Law Firm

Defense Counsel: Daniel Belsky, Esq. (for Dr. Morris), Belsky & Associates and Marilyn Moriarty, Esq., Lewis, Brisbois, Bisgaard & Smith (for Palomar Pomerado) Incident: Medical malpractice/ brain injury

Settlement Demand: Plaintiffs demanded \$1 million from each defendant.

Settlement Offer: Dr. Morris served plaintiffs with a CCP \$998 offer for zero dollars and a waiver of costs

Trial Type: Jury

Trial Length: 16 days

Verdict: Defense

Case Title: Rachel Greathouse v. The Regents of University of California and Gerard Arcilla, M.D.

Case. No.: GIC 789290

Judge: Honorable Charles Wickersham

Plaintiff Counsel: Brian Dawson, Esq. and Brendan Ozanne, Esq., Dawson & Ozanne

Defense Counsel: Robert Cosgrove, Esq. of Cosgrove & Birmingham, D. Scott Barber, Esq. of Grace Brandon Hollis LLP

Type of Incident: Wrongful death following gastric bypass

Settlement Demand: \$175,000 from Defendant Dr. Arcilla, \$150,000 as to The Regents

Settlement Offer: Waiver of costs

Trial Type: Jury

Trial Length: 10 days

Verdict: Defense for both defendants

Case Title: Stephen McMahon vs. Jeffrey Morris, M.D., and Does 1-5

Case No.: GIC800195

Judge: Honorable Jay M. Bloom

Plaintiff Counsel: Duane A. Admire, Esq., Admire & Associates

Defense Counsel: Robert W. Harrison, Esq., Neil, Dymott, Perkins, Brown & Frank

Type of Incident: Medical Malpractice

Settlement Demand: \$250,000

Settlement Offer: Waiver of costs

Trial Type: Jury

Trial Length: 6 days

Verdict: defense



A Lawyer's Guide to Cross-Cultural Depositions

by Nina Ivanichvili

This article is Part II and continues the discussion of the use of professional interpreters in cross-cultural depositions.

Set Clear Deposition Ground Rules

Even to an English-speaking person, a deposition can be a confusing experience with a language and rules of its own. Most non-English-speaking individuals who were raised in foreign countries have never been in contact with lawyers, lack knowledge of the American legal system, and have different perceptions of private property and dispute settlement procedures. For such deponents, a deposition can be intimidating.

Sometimes, non-English speakers try to use a deposition as a venue for making lengthy and evasive statements about their case, feeling triumphant that they finally have an opportunity to be heard. They may ramble, answer a question with a question, and easily forget or disregard instructions given to them by counsel.

Attorneys involved in a cross-cultural deposition would benefit by establishing clear ground rules from the start. Counsel might advise the non-English-speaking deponent regarding:

- speed and simultaneity of conversation (no interruptions are allowed; only one person may speak at a time; the witness needs to pause from time to time to let the interpreter interpret)
- not engaging in conversation with the interpreter
- answering only the questions asked
- providing intelligible verbal responses to each question asked rather than nodding or making "uh-huh" sounds.

If the witness starts providing long-winded responses to the questions, counsel can allow the interpreter to use a hand signal with a deponent to alert the deponent when he or she is talking too fast or too long. By raising a hand, the interpreter will ask the deponent to pause and let the interpreter convey the uttered statement.

Establish Rapport Using Self-Disclosure and Feedback

Some attorneys rarely give verbal feedback during depositions. They stay busy with their notes, flip through documents, and rarely look at the deponent. Such behavior can stimulate mistrust and defensiveness in a deponent, particularly where there are cultural differences between the deponent and counsel.¹⁶ For example, the author has been advised that many

American attorneys are unaware of the importance of building respect when deposing male deponents from Turkey or Iran. The deposing attorney's stern or business-like manner, seemingly sarcastically lifted eyebrow, or raised voice often are perceived by such deponents as criticism of them and, therefore, as an insult to their pride. When this happens, the attorney has lost the opportunity to obtain open, candid responses from the deponents.

Trial lawyers often use self-disclosure effectively to develop rapport with jurors during the jury selection process. Although openness is not required, they know they can make that process more meaningful if they "disclose something of themselves during the questioning."¹⁷ This tactic may be equally effective in establishing rapport with a non-English-speaking deponent in a cross-cultural deposition based on the simple principle, "if you want a clear view of another person, you must offer a glimpse of yourself."¹⁸ Before going on the record, the opposing attorney might offer the witness a drink of water and indulge in a little small talk with the deponent to put him or her at ease.

The author is cognizant of the important role that positive feedback plays during the course of the deposition in encouraging the non-English-speaking deponent's responses. When positive feedback is given, using simple phrases such as, "I see," "Thank you," and "I appreciate it,"¹⁹ people speak more readily and state their answers more freely. When the deposing attorney does not make value judgments about the testimony and is neutral or positive, the non-English-speaking witness is likely to "feel more accepted and be more comfortable."²⁰ As a result, there is an increased likelihood that he or she will be forthcoming when providing testimony.

Strive to Be More Culturally Relative

Lawyers involved in cross-cultural depositions are likely to create communication misunderstandings if they view or treat people from different cultures as being "generally more similar to themselves than dissimilar."²¹ This behavior is termed "assumed similarity."²² Assumptions about the meaning of similarities may cause a deposing attorney to stereotype and misjudge a deponent. Consider the following hypothetical.

An American attorney is deposing a well-dressed, middle-aged, non-English-speaking woman in a civil lawsuit. The woman is originally from a small, male-dominated village. She states that she has held several jobs since moving to the United States. However, she does not know what her articles of clothing cost because her husband makes all the purchasing decisions in the family. Because the deponent is employed, the attorney may assume some similarities between the deponent and her American counterparts. Nonetheless, her working status does not make her independent—financially or otherwise—from her husband, who continues to make all of the important decisions.

While deposing a non-English speaking witness, lawyers likely will benefit from being more “culturally relative,”²³ which is the opposite of ethnocentric. Instead of viewing the whole world through the prism of the American cultural archetypes, it helps to remember that more than one meaning may exist for verbal messages communicated between people from different cultures. Thus, in the above-mentioned example, in the deponent’s cultural worldview, it is common for a woman to have a job and still let her husband make all of the financial decisions for her. In the American deposing attorney’s cultural worldview, however, this is not a consideration.

Acknowledge Cultural Taboos— But Ask the Question

“The potential for misunderstandings, confusion, and hostility increases in the intercultural exchange.”²⁴ During cross-cultural depositions, it is easy to inadvertently delve into areas of cultural taboos, which represent beliefs that make discussion of certain topics forbidden or discouraged. For example, most American attorneys might not anticipate that questions related to loss of consortium in a personal injury case are likely to arouse animosity in Russian-speaking deponents of either gender. Only a decade ago, in Russia, discussing one’s sex life in public amounted to expressing a cultural taboo.

Deponents from many cultures would find questions embarrassing if they pertain to intimacy, certain medical conditions, human anatomy, and bodily functions. Attorneys should be aware of this possibility and prepare the deponent prior to verbalizing a sensitive question by saying, for instance, “I know that it may be uncomfortable for you to answer questions like the one I am going to ask, but I need to ask it.”

Ask Simple Questions

An examining attorney should use simple sentences and basic vocabulary during a cross-cultural deposition. Counsel should avoid legal terms when possible; they

frequently are unfamiliar and confusing, even when expressed in the witness’s native language. If the need arises to ask questions containing legal terms, the examining attorney will benefit by asking the interpreter’s advice on ways to phrase the question. An effective interpreter may anticipate problems with some questions based on differences in attitude or culture that could hinder the deponent’s understanding of the question. In such situations, the interpreter may ask the attorney to rephrase the question.

Counsel also should be aware that many English words, including legal terms, have no semantic parallel—and sometimes no conceptual equivalent—in other languages. For example, it takes at least four Russian words to convey the concept of a “deposition” and at least five Russian words to say “deponent.” Therefore, the interpreter often may need to use some descriptive terms, which would take longer than the counsel’s familiar way of speaking.

A basic understanding of the idiosyncrasies of the deponent’s native language also will help counsel improve his or her communication with the witness during a cross-cultural deposition. For example, Laotians and Thais often reply to yes/no questions by repeating the verb from the question. Therefore, when asked a simple question requiring a yes/no answer, such as, “Are you married?” the deposing attorney might hear “Married” instead of “Yes”; when asked, “Do you have other relatives in the US?” the answer might be “Have no other relatives” instead of “No.” Knowledge of this fact will allow counsel to avoid the frustration of insisting that the witness reply to his or her question with a clearly stated yes or no, or blaming the witness for being evasive.

Be Tolerant of Nonresponsiveness

Many non-English-speaking deponents are embarrassed to admit that they do not understand a question, even when the question is spoken in their own language. If the deponent appears nonresponsive or evasive, the deposing attorney might want to clarify whether the question might have been misconstrued. The deponent’s nonresponsiveness may be “nothing more than a bump in the conversational road”;²⁵ with a few additional questions, the attorney may be able to easily get the required information.

On the other hand, attorneys need to recognize that many people from other cultures find it “insensitive and rude” when someone insists on discussing an issue that “they have plainly tried to avoid.”²⁶ Instead of alienating the deponent by pursuing further questions in the area that the deponent appears reluctant to discuss, it may help to try another approach later.²⁷

Finally, many Americans are uncomfortable with silence. In some cultures, it is common to remain silent before answering a question. Silence allows time to process information and, as such, may be viewed as part of a person’s cognitive process. It will be to the attorney’s benefit to allow for silence without assuming it is due to the deponent’s discomfort or evasiveness.

Allow for Short Recesses

Interpretation is a complex process involving a high degree of concentration as the interpreter attempts to first hear, then understand, analyze, and, finally, express ideas coherently in another language. Compound questions by an examining attorney and long-winded responses by a deponent during a deposition require great focus on the part of the interpreter. Non-stop interpretation for several hours at a time can lead to the interpreter’s fatigue, which impairs attention.²⁸ Short recesses are recommended to combat the interpreter’s fatigue factor and to ensure an accurate record.

Conclusion

Admittedly, no civil or criminal case is likely to rise to the level of dire emergency that the U.S. President faced in the movie *Fail-Safe*. Nonetheless, attorneys can maximize their chances of having a relatively smooth and, perhaps more revealing, deposition. By understanding some of the intricacies of cross-cultural depositions, counsel can adjust their preparation, actions, and style to prevent inexplicable surprises in the deposition process.

FOOTNOTES

16. Morris, “Effective Communication with Deposition Witnesses,” 36 *Trial* 70, 78 (2000).
 17. Dimitrius and Mazzarella, *Reading People: How to Understand People and Predict Their Behavior—Anytime, Anyplace* (New York, NY: Random House, Inc., 1998) at 10.
 18. *Id.*
 19. Morris, *supra*, note 16 at 77.
 20. *Id.*
 21. Haskins, “Pitfalls in Intercultural Communication for Lawyers,” 16 *Trial Diplomacy J.* 71, 74 (1993).
 22. *Id.* at 73.
 23. *Id.* at 75.
 24. Kessler, “The Lawyer’s Intercultural Communication Problems With Clients From Diverse Cultures,” 22 *Beverly Hills B.J.*, 251, 257 (1988).
 25. Dimitrius and Mazzarella, *supra*, note 17 at 147.
 26. *Id.* at 148.
 27. *Id.*
 28. Vidal, “New Study on Fatigue Confirms Need for Working in Teams,” VI(1) *Proteus* (1997), available at <http://www.geocities.com/paschmcc/TeamingFatigue.pdf>.
- Nina Ivanichvili is CEO of All Language Alliance, Inc., a Colorado-based translation company specializing in legal, technical, financial, and medical translations in over 80 languages. She is also an English-Russian court interpreter and an English-Russian translator, accredited by the American Translators Association—(303) 470-9555; translate@languagealliance.com; website: <http://www.languagealliance.com>. Attorneys in California can get credit for taking this online CLE course. See the details at <http://languagealliance.com/white-paper>.

Member News

The Bottom Line

Case Title: Enedina Medina v. Charles O. Crabb and Maria Victoria Crabb

Case No.: GIS008121

Judge: Honorable John S. Meyer

Plaintiff Counsel: Craig A. Sanders, Esq. and Steven W. Haskins, Esq. of Haskins & Associates

Defense Counsel: Timothy D. Lucas, Esq. of Parker •Stanbury, LLP

Type of Incident: Alleged real estate sales fraud in connection with the sale of a 1/4 acre lot with a non-permitted house.

Settlement Demand: Demand lowered to \$95,000.00 prior to trial.

Settlement Offer: Clients made \$998 of fer for \$1,000.00.

Trial Type: Jury

Trial Length: 3 days

Verdict: Defense

Case Title: Vernon Stankewitz v. Michael P. Koumjian, M.D.

Case No.: GIE 014269

Judge: Honorable Lillian Y. Lim

Plaintiff Counsel: James M. McCabe, Esq.

Defense Counsel: Robert W. Frank, Esq., Neil, Dymott, Perkins, Brown & Frank

Type of Incident: Use of blood transfusion consisting of platelets during triple coronary artery bypass surgery on Plaintiff, a member of the Jehovah's Witness faith

Settlement Demand: C.C.P. \$998 \$48,000.00 Offer

Settlement Offer: None

Trial Type: Jury

Trial Length: 5 days

Verdict: Defense

Case Title: Cook v. Pardee

Case No.: GIC 769046

Plaintiff Counsel: Robert Bright, Esq., Levison Bright, LLP

Defense Counsel: Robert C. Carlson, Esq. and Stephen Wichmann, Esq., Koeller, Nebeker, Carlson & Haluck, LLP

Type of Incident: Personal Injury - alleged carbon monoxide poisoning from HVAC unit

Settlement Demand: \$8 million

Settlement Offer: \$150,000 for mother and \$100,000 for minor

Trial Type: Jury trial

Trial Length: Six weeks

Verdict: Defense

John D. Milikowsky, a 2003 graduate of California Western School of Law has joined the firm of Kenneth N. Greenfield. Mr. Milikowsky will work in the areas of civil litigation and insurance bad faith.

John Addams has relocated his office to One America Plaza, Seventh Floor, 600 West Broadway, San Diego, CA 92101. He can be reached at: 619-232-2862 (voice), 619-232-2553 (fax) and email:

jaddams@san.rr.com. Mr. Addams is a long-time member of SDDL and a sole practitioner practicing in the area of civil litigation with emphasis on appeals and insurance coverage.



Gary C. Ottoson, a partner of Bacalski, Byrne, Koska & Ottoson, LLP, is named in the Southern California Super Lawyers 2004 list which will appear in the February 2004 issue of Los Angeles Magazine and in a special publication, Southern California Super Lawyer. Only 3% of Southern California licensed attorneys made the list. Gary has tried over 85 jury cases in Federal and Superior Courts in California. His cases have covered a broad spectrum of civil litigation including mass tort, product liability, intellectual property, business related matters and professional liability involving attorneys, real estate brokers and others. He also handles contract and partnership disputes. Gary is a past president of the Association of Southern California Defense Counsel, a Fellow of the American College of Trial Lawyers, and an Advocate in the American Board of Trial Attorneys. A graduate of U.S.C. Law School, he serves on its' Board of Councilors.

Fredrickson Mazeika & Grant, LLP, is pleased to announce **Marc D. Cleavinger** has accepted a partnership with the firm. Marc is a graduate of the University of Missouri Law School and licensed in the States of California and Missouri. His career includes numerous trials in both the public and private sectors of the law. Marc's practice includes matter relating to environmental/toxic torts, professional malpractice, construction law, and personal injury. The firm also congratulates its partner, **Billie J. Jaroszek**, on her election to the presidency of San Diego Defense Lawyers Association, 2004. Lastly, the firm

also congratulates its law clerks, **Darlene Shea** and **Jeffrey Hohlbein**, on passing the California Bar. Darlene is a 2003 graduate of California Western School of Law, and has accepted an associate's position with the firm, practicing in the areas of personal injury and construction law. Jeffrey is a 2003 graduate of the University of San Diego School of Law.

Dan and Solveig Deuprey are pleased to announce that **Deuprey & Associates** has relocated its offices to Suite 2800 of the Emerald Plaza, 402 West Broadway, San Diego, CA 92101. The firm is comprised of five attorneys and offers legal services in the following areas of law: healthcare, physicians and hospitals, attorney professional liability, general tort litigation, personal injury, mediation and arbitration, family/dissolution proceedings, animal law and premises liability. Dan H. Deuprey has been an active trial attorney in San Diego for more than thirty years. He hold the advanced rank of Advocate with the American Board of Trial Advocates and serves as a Master for the Louis Welch Chapter of the American Inns of Court.

*You are cordially invited to attend
San Diego Defense Lawyers
Nineteenth Annual Installation Dinner*

Honoring

*David G. Brown
Neil, Dymott, Perkins, Brown & Frank,
San Diego Defense lawyer of the Year*

*and
Honorable John S. Rhoades,
U.S. District Court,
San Diego Defense Lawyers 2003 Honoree*

*Saturday, January 31, 2004
Hyatt Regency San Diego
1 Market Plaza
San Diego, CA 92101*

<i>\$150 Couple</i>	<i>Cocktails</i>	<i>6:30 P.M.</i>
<i>\$75 Individual</i>	<i>Dinner/Program</i>	<i>7:30 P.M.</i>
<i>\$750 Table of 10</i>	<i>Dancing</i>	<i>9:00 P.M.</i>

Business attire

San Diego Defense Lawyers Second Annual Golf Benefit

The San Diego Defense Lawyers second annual golf tournament was a huge success!!! Through the efforts of our members, and sponsors, we were able to raise \$6,500 on behalf of Juvenile Diabetes Research Foundation. Additionally, all participants were treated to a fantastic day of golf and an outdoor BBQ. Many thanks to all who participated in this years golf tournament, and to the sponsors. We hope to see you all again in 2004.

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*Dale Martin
checks in to play*



*Denny Aiken
previews the
awesome raffle
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Peter Doody, Dino Buzunis, chair, Patti Bilitnikoff, Coleen Lowe and Lili Mostofi "rake in the dough" for the Juvenile Diabetes Foundation.

The Red Boudreau Dinner. . .



sponsored by San Diego Defense Lawyers, Association of Business Trial Lawyers, American Board of Trial Advocates, and Consumer Attorneys of San Diego, has for the past 19 years raised money for St. Vincent de Paul Village. And so it was that on November 1st the 19th Annual Red Boudreau Trial Lawyers Dinner to Benefit St. Vincent de Paul Villages and honor Charles Dick as the 2003 recipient of the Broderick Award was held. This black-tie affair, held at the Manchester Grand Hyatt - San Diego made it possible for these organizations to present Fr. Joe Carroll with a check for \$30,000. President Pete Doody joined Steve Boudreau in the presentation which was made during the Roger Hedgecock show on December 17th.

The Bottom Line

Case Title: Michael Iha v. Regents of The University of California, University of California Medical Center at San Diego (UCSD), Dr. Lawrence Marshall, as Director of Neurosurgery and Personally and Does 1 to 300, Inclusive

Case No.: GIC 798800

Judge: Honorable Kevin A. Enright

Plaintiff Counsel: Noel Spaid, Esq.

Defense Counsel: Robert W. Frank, Esq., Neil, Dymott, Perkins, Brown & Frank

Type of Incident: Neurosurgical repair of CSF leak and reconstruction of skull

Settlement Demand: None

Settlement Offer: 998 Offer for Waiver of Costs

Trial Type: N/A

Trial Length: N/A

Verdict: Judge granted Defendant's Motion for Non-Suit on July 25, 2003. Judgement entered in favor of Defendant on November 7, 2003

Case Title: Barbara Edelson vs. Gary Greenberg, D.D.S., and DOES 1 through 20 Inclusive

Case No.: GIC785935

Judge: Honorable Jay M. Bloom

Plaintiff Counsel: Michael Frank, Esq., Sussman & Schwartz

Defense Counsel: Robert W. Harrison, Esq., Neil, Dymott, Perkins, Brown & Frank

Type of Incident: Dental Negligence

Settlement Demand: \$35 million, later reduced to \$249,000

Settlement Offer: None

Trial Type: Jury

Trial Length: 8 days

Verdict: Defense

Case Title: David Lee et al. v. David James Carro et al.

Case No.: 02CC01338 (Santa Ana Superior Court)

Judge: Honorable Mary Fingal-Erickson

Plaintiff Counsel: Daniel D. Rodarte, Esq., Law Offices of Daniel D. Rodarte,

Defense Counsel: John P. Christenson, Esq., State of California, Dept. of Transportation for the State of California, Peter Gates, Esq., Gates, O'Doherty, Gonter & Guy, LLP, for Defendants David James Carro, James Carro, Maureen Carro and T&M, Inc. doing business as Chemical Data Management Systems

Type of Incident: Wrongful Death action brought by husband and two sons of a 48 year old who was killed while crossing the intersection of Pacific Coast Highway and Seapoint Ave. in Huntington Beach, CA.

Settlement Demand: 5 million from all defendants

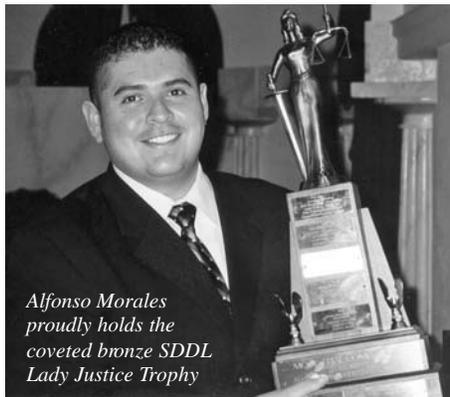
Settlement Offer: 998 for a waiver of costs

Trial Type: Jury

Trial Length: 4 weeks

Verdict: Defense (\$103,700 in costs awarded to State)

Has Your Firm Considered the SDDL Mock Trial Competition As a Way To Identify New Lawyers With Excellent Advocacy Skills?



Alfonso Morales proudly holds the coveted bronze SDDL Lady Justice Trophy

Real Judges, Excellent Case Presentations Highlight This Year's SDDL Mock Trial Competition

Senior Judge John Rhoades of the United States District Court and San Diego Superior Court Judges David Gill, Luis Vargas, Gerald Jessup and Richard Whitney all supported SDDL by serving as judges for the SDDL Mock Trial Competition held in October.

After two nights of preliminary rounds, teams from Brooklyn Law School, Thomas Jefferson School of Law and University of San Diego School of Law advanced to the final day of competition. The students participating in the

competition were extremely well prepared, and many demonstrated excellent advocacy skills. Most participating law schools hold tryouts, enabling them to select the best advocates from a large pool of very competitive applicants. The Mock Trial arena has become a fertile ground for cultivating new associates. University of San Diego School of Law currently places a higher percentage of Mock Trial team members in summer legal jobs than members of Law Review or the Moot Court Board. SDDL members who volunteered to serve as judges were able to see, outside of the usual job interview context, just how talented these law students really are. Putting the time invested to good use, at least one SDDL member made a job offer to a Mock Trial competitor on the spot. This year's competition presented evidentiary and courtroom skills issues in the context of an Americans with Disabilities trial. Competitors were required to represent the plaintiff one night, and the defendant the next night. A "happy hour" reception for all the student competitors and the SDDL "judges" was held following the second round. Ultimately, University of San Diego prevailed over Thomas Jefferson in the final round, taking home the trophy for the fourth year in a row.

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MEDIATION WORKS

“Substance Abuse: Anatomy of a DUI”

By Dennis S. O’Neill, Farmer & Case

On December 4, 2003, The San Diego Defense Lawyers presented a very interesting and informative program entitled “Substance Abuse: Anatomy of a DUI.” The speakers were criminal defense attorney, John “Jack” Phillips, Esq., and Officer Blake Cheary, a member of the San Diego Police Department DUI Team. Therefore, the audience was treated to both sides of the coin on this subject.

Mr. Phillips had some very good advice for attorneys operating motor vehicles who are stopped by the police after consuming alcoholic beverages. First of all, do not tell the officer you are an attorney. Police officers generally do not like attorneys. Additionally, be polite to the officer, but do not agree to take the preliminary alcohol screening test to determine your blood/alcohol level at the scene of the traffic stop. However, if you are arrested, you must submit to a chemical test, (breath or blood) to determine your blood/alcohol level or lose your driver’s license for one year. Mr. Phillips also advises not to take the field sobriety test if you have any doubts whether or not you are under the influence. The legal limit is .08 percent blood/alcohol level.

Of interest, 20 percent of the DUI cases Mr. Phillips handles involve a defendant who was talking on a cell phone when he/she was pulled over. Additionally, the areas targeted by the San Diego Police Department DUI team are Mission Valley, The Gaslamp area, Pacific Beach and the border area.

Per Officer Cheary, DUI drivers are a health risk to all of us. In 2001, there were 17,500 alcohol-related deaths and 250,000 alcohol-related serious injuries for motor vehicle accidents. Officer Cheary agrees that it is helpful to be polite to the officer and further advises that you should not lie to the officer because more times than not the officer will determine that you are lying. Additionally, do not resist arrest because you will lose the fight. If you are arrested, before you are transported you chose the type of chemical test that will be given to you. The blood test is given at a hospital and the breath test is given at the police station. Although both test are very accurate, a blood test will usually produce a slightly higher result than a breath test (.11 percent versus .10 percent). However, a blood sample can be retested, while a breath sample cannot.

The bottom line is, DUI cases are difficult to win, so taking a taxi is the cheapest insurance you can buy!

“Legislative Update”

By Christopher R. Allison, Esq.,
Farmer & Case



Board Member Clark Hudson, ASCDC President Bob Harrison, Speaker Mike Beloit and SDDL President Peter Doody enjoy the reception before the MCLE program

On October 9, 2003, the San Diego Defense Lawyers and Association of Southern California Defense Counsel put on a joint presentation of “Legislative Updates and HIPAA Compliance for Defense Attorneys.” The speakers were Michael Belote - Lobbyist for California Defense Counsel, and Daniel P. Groszkruger - Of Counsel to DiCaro Coppo & Popcke.

The charismatic Mr. Belote updated the audience on the current status of pending legislation. Additionally, he also spoke on the pragmatics behind how a law is actually written and then enacted in Sacramento. Needless to say, many compromises and revisions often take place. Finally, Mr. Belote explained why the defense bar needs to have a gatekeeper such as California Advocates to protect its interests in the turbulent and unpredictable world of state legislation.

Next, Mr. Groszkruger summarized what HIPAA (“Health Insurance Portability & Accountability Act”) is, and more importantly, what it means to the defense bar. HIPAA is an attempt to create a comprehensive federal plan for dealing with patient privacy in the electronic world of modern medicine. Although Mr. Groszkruger did not have nearly enough time to explain in detail the many facets of this Act, he eloquently focused on the areas which he knew were of import to his audience. More specifically, he demonstrated how HIPAA should not affect how defense counsel work their cases. At least in theory, California law regarding obtaining medical records via subpoena satisfies HIPAA requirements. However, Mr. Groszkruger notes that much about HIPAA is still somewhat unclear and will need to be clarified by case law. Accordingly, the resulting trepidation by health care providers (especially in light of possible HIPAA sanctions) may cause them to be excessively cautious in providing patient information.

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"Jury Instructions"

By: Kristin A. Butler, Farmer & Case

Judge Michael Orfield and Mr. Vu Pham from LexisNexis presented an informative seminar regarding the origin, development and use of the new CACI (pronounced "Casey") standard civil jury instructions and the related Hot Docs program. CACI has been a work in progress for six and a half years. A commission created by the Chief Justice developed a completely revamped set of jury instructions that are written in plain language, with great pains taken to avoid the legalese that often characterized the BAJI instructions, which were found to be confusing at best to many civil juries. They are considered to be a "work in progress" in that they are inherently subject to comment and review by Judges and attorneys who use them, potentially leading to further revision.

In August 2003, the Judicial Council adopted CACI as the only jury instructions to be used. It has not been mandated that they be used. However, they are "strongly encouraged to be used" under Rules of Court Rule 855. In September 2003, the California Bar Association adopted CACI as the official set of instructions to be used. Judge Orfield recommends that we seek clarification from assigned trial Judges at the first CMC, as to which jury instructions they prefer.

LexisNexis is the official publisher for CACI. Judge Orfield cautioned that the West copy of CACI may contain some errors.

The Hot Docs program simplifies the creation of sets of proposed instructions, in that completion of an informational template (an "Answer File") then allows the program to complete all of the information in the instructions that you choose, including names, genders, etc. From there, you choose the instructions that you want. Once the first "Answer File" has been created, it can be used repeatedly for similar cases, cutting the time spent drafting significantly. Lastly, via the web, practitioners can provide the committee in charge of CACI immediate feedback regarding use and potential modifications to the new instructions.



"Trial Publicity" - Ethical Promotion of Your Case

By: Gina C Haggerty, Esq., Farmer & Case

The SDDL brown bag lunch seminar on October 30, 2003, was presented by Wendy L. Patrick and Luis Ventura and provided useful information on how to deal with trial publicity in an ethical fashion. Ms. Patrick is with the District Attorney's office and Mr. Ventura is in private practice at Epsten, Grinnell & Howell.

The panelists began the presentation by providing a checklist to follow when providing a quote to the media. The quote should be lawful, ethical, non-defamatory, non-invasive of privacy rights, interesting, true, insightful and delivered with poise. Other important tips when providing a quote to the media are to remember that nothing is "off the record" and to refrain from saying anything that you would not want to read on the front page of the newspaper.

The panelists next provided an overview of the history of the rules and guidelines for trial publicity. In 1908, the applicable Ethical Rule, Canon 20, generally condemned statements to the media. However, thereafter, the Courts realized that they could not prevent the media from covering a case without imposing an unconstitutional restriction on freedom of press. Thus, in order to create a fair balance between the competing interests of a right to media coverage and a right to a fair trial, the Court held in the 1966 case styled, *Sheppard v. Maxwell*, that gag orders and contempt laws can be used to protect the right to a fair trial. In 1970, further advances in trial publicity were made when the ABA Model Code DR 7-107 followed the language of *Sheppard v. Maxwell* and laid out what constitutes permissible and prohibited statements. The ABA continued to make advances in the area of trial publicity and in 1983, Model Rule 3.6 was created and subsequently amended in 1994. Today, the governing rule for trial publicity is California RPC 5-120. This rule closely follows ABA Model Rule 3.6 and states that the test under RPC 5-120 is whether there is a "substantial likelihood of material prejudice."

The panelist discussion also covered defamation issues and invasion of privacy laws. Accordingly, a permissible statement must be lawful, truthful, ethical and non-defamatory. An opinion statement is usually not defamatory, but may be considered slanderous under Civ Code sec. 46 if it has a natural tendency to injure reputation. However, statements made in Court, even if false, are absolutely privileged under Civ. Code sec. 47(b). Civil Code sections 47(a) and (b) offer the highest protection for statements made in Court. If the same statement was made by the attorney outside the Court the same protection would not apply. As for privacy interests, statements by themselves can be a dangerous violation of privacy rights. The elements considered to determine if an individual's privacy rights have been violated are: 1) is there a protected privacy interest, 2) is there a reasonable expectation of privacy, and 3) are the statements or conduct seriously invading that privacy. Cases to review under this issue are *Susan S. v. Israles*, *Randall v. Scovis* (Unpublished), and *Carlson v. Superior Court*.

Lastly, the panelists discussed Ethical Rules from the defense perspective. The key rule referenced in this discussion was Bus & Prof. Code §6068. Under this rule an attorney must obey the law and constitution, respect the court, maintain just causes, be candid, maintain client's secrets (certain exceptions), respect parties and witnesses and promptly correct any misleading statements made by a witness during trial.

In concluding, the panelists presented a quote from an unknown author that sums up the topic: "Every job is a self-portrait of the person who did it. Autograph your work with excellence."

Thank You

San Diego Defense Lawyers
would like to thank

— Brenda Peterson —

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Forensic Psychiatry - Guidelines for Use and Assessment of Psychiatric Testimony

By: Merris A Welch, Esq., Farmer & Case

On September 25, 2003, Dominick Addario, M.D., Clinical Professor of Psychiatry, UCSD, a well respected psychiatric expert offered guidelines for use and assessment of psychiatric testimony in litigation. Dr. Addario provided information ranging from the qualifications of mental health professionals, to diagnosis in psychiatry and ethics in medical testimony. Additionally, he discussed the use of psychiatry in civil cases, including the adversarial constructs between defense issues and plaintiff issues. An important aspect that may often be forgotten when utilizing an expert for litigation purposes, be it a psychiatrist or an orthopedist, is the definition of "expert." Dr. Addario said that the "expert" is not defined by his or her proven extraordinary recognition in one's clinical field but is defined, rather, by his or her acceptance by the court as being suitable to perform "expert" related functions. More specifically, Dr. Addario discussed, in a brief sense, the most common diagnosis found in civil and criminal law, including substance abuse disorders, organic mental disorders, schizophrenia, mood disorders, post-traumatic stress disorder, somatoform disorders, sleep disorders, factitious disorders and malingering, adjustment disorders and personality disorders, any of which may be addressed by a mental health professional by conducting an Independent Medical Examination. Importantly, Dr. Addario mentioned *Golfland Entertainment Centers v. Superior Court* (2003) 133 Cal.Rptr.2d 828, which held that a mental examination pursuant to Code of Civil Procedure, section 2032, may not be observed by counsel or recorded by a court reporter. *Golfland* is a recent and important case to consider when contemplating the necessity of a psychiatric IME. Overall, Dr. Addario's presentation provided a useful guide with related materials, which should be considered when handling a case that involves psychiatric issues.



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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.

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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:

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