

The Update

Winter 2007

SAN DIEGO DEFENSE LAWYERS

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THE BOTTOM LINE

Case Title: Zenner v. Croxen
 Case Number: GIN044221
 Judge: Honorable Thomas Nugent
 Plaintiff's Counsel: Russell S. Kohn of Kohn Law Office
 Defendant's Counsel: Darin J. Boles of Aiken & Boles
 Type of Incident/Causes of Action: Case involved a truck versus car rear end accident involving \$1,438 in damage to plaintiff's Ford and no damage to defendant's GMC truck. Plaintiff claimed soft tissue injuries and a prolonged recovery from a subsequent child birth due to her injuries with medical specials of \$6,819. Liability was admitted but causation and damages were disputed.
 Settlement Demand: CCP 998 of \$14,999 and \$30,319 at trial
 Settlement Offer: CCP 998 of \$1,001
 Trial Type: Jury/Judge Jury (8 Pack)
 Trial Length: 3 Days
 Verdict: Defense on Causation

Case Title: Urrutia v. Bennett/Kruger
 Case Number: GIE028345
 Judge: Honorable Jan Goldsmith
 Plaintiff's Counsel:
 Defendant's Counsel: Darin J. Boles
 Type of Incident/Causes of Action: The Kruger defendants, who resided out of state, owned a house in San Diego which they rented to their grandson.
 Unbeknownst to the Krugers, their grandson permitted a friend, Mr. Bennett, to stay for several weeks with his Pit Bull. Bennett's Pit Bull proceeded to bite a neighbor child on the face, resulting in permanent scarring. In their Motion for Summary Judgment, the Krugers argued the Lundy, Uccello and Donchin line of cases, which established that an off site landlord must know the dog exists on the property, must have actual knowledge of the dog's dangerous propensities and be in a position to do something about the dog. After granting a continuance to allow additional discovery, the Court ruled, more than 125 days after the filing of the motion, in favor of the Krugers, finding plaintiff could not meet their burden of proof on the knowledge elements.
 Settlement Demand: \$168,547
 Settlement Offer: Waiver of costs
 Ruling: Granted



President's Message

The end of another year and the start of the next is always a time of reflection for me, as I expect it is for most people. As defense lawyers, we tend to look back on a year in terms of how successful we were, whether this means positive results in trial, benefits to our clients, or increased productivity from our staffs and ourselves. I recently came across a quote that has been attributed to Ralph Waldo Emerson that I am sure many are familiar with. It is a commentary on success and goes as follows:

To laugh often and much;

To win the respect of intelligent people and the affection of children;

To earn the appreciation of honest critics and endure the betrayal of false friends;

To appreciate beauty, to find the best in others;

To leave the world a bit better, whether by a healthy child, a garden patch or a redeemed social condition;

To know even one life has breathed easier because you have lived.

This is to have succeeded.

As we take time to reflect upon a year passed and a year about to commence, it is my sincere hope that all of us strive for both traditional lawyerly success, as well as success in life as set forth above by Ralph Waldo Emerson. Best of Luck in 2007

Martha Dorsey

San Diego Defense Lawyers 2006 Golf Benefit Nets \$5,500 for Juvenile Diabetes Research Foundation



Clark Hudson, Golf Benefit Co-Chair, Martha Dorsey, San Diego Defense Lawyers President and Ken Greenfield, Golf Benefit Co-Chair present Linda Riley, Executive Director for Juvenile Diabetes Research Foundation with a check for \$5,500.

2006 San Diego Defense Lawyers Honoree of the Year San Diego County Superior Court Presiding Judge Janis Sammartino



Janis Sammartino has been serving in the San Diego Superior Court's top post since January 2006. Presiding Judge Sammartino oversees a budget of more than 200 million dollars, 154 judicial officers, and a support staff of more than 1,600 employees. Judge Sammartino became only the second woman in the county's history to serve as the presiding judge for the Superior Court. After two years of service as the assistant presiding judge, Sammartino won the backing of her colleagues on the bench to rise to the top post. Her previous judicial assignments at the Superior Court included terms in the Family and Civil Courts.

She is most proud of the Superior Court's teamwork and state leadership. The San Diego Superior Court has obtained a leadership role in contemporary state court issues such as technology, self-represented

litigants, and court security. Judge Sammartino applauds teamwork among judicial officers and court staff and credits their joint efforts with producing the Court's state-wide leadership role.

Judge Sammartino's appointment to the bench is a representative natural progression of an exceptional career in public service. Prior to becoming a judge, Sammartino practiced for almost 18 years in the San Diego city attorney's office. Her final 4 years were spent as senior chief deputy city attorney. During her time at the city attorney's office, Sammartino developed an expertise in land-use issues. She published numerous articles on managing urban growth, environment, and housing issues in San Diego.

Judge Sammartino currently serves on 12 judicial committees in addition to involvement in various local, state, and national professional associations and clubs. She received her J.D. from the University of Notre Dame and graduated magna cum laude from Occidental College in Los Angeles with a B.A. in Political Science.



Dennis Aiken 2006 San Diego Defense Lawyer of the Year

Who do Don Coryell, John Madden and Joe Gibbs have in common? This year's San Diego Defense Lawyer of the Year, Dennis Aiken. Dennis is the managing attorney of Aiken & Boles.

Mr. Aiken's roots go deep into the San Diego community. He was raised in the college area of

San Diego by parents from the Greatest Generation, including a World War II veteran father, Fred Dennis Aiken, Sr., and mother, Mary. In addition to keeping his older sister, Pat, on her toes, Mr. Aiken was involved with football, wrestling and rugby from a very early age. After graduating from Crawford High School, he attended San Diego State where he excelled both academically and on the field. His path crossed that of future Hall of Fame coaches Madden, Gibbs and Coryell, who fed a deep desire to win and instilled a confidence to do so in whatever he attempted.

After serving in Vietnam, he came back to San Diego to obtain his Juris Doctor from California Western School of Law in 1975. He entered private practice where he handled both civil and criminal defense cases before moving to Los Angeles to practice with the Early Maslach firm for five years, finally returning to San Diego to establish the Branch Legal Office for Farmers Insurance with George Murray in 1983.

Since that time, Mr. Aiken has aggressively defended countless clients in premises liability, medical malpractice and automobile cases. He has handled the gamut of injuries from death to paralysis on one hand to the most benign on the other. Regardless of the circumstances which brought the client to him, Mr. Aiken has consistently found a way to protect his client, and in turn, the client's insurer, via a favorable settlement or trial result.

He has taken the skills acquired from those exceptional coaches to build winning strategies and protect his client's interests first. Mr. Aiken believes the circle of success includes striving to be a top professional in your field without forgetting your personal life. He encourages attorneys to maintain flexibility and credibility at all times. As an example of flexibility, Mr. Aiken was called to Court when one of his lawyers went into labor after answering ready for trial. Mr. Aiken stepped in to try the wrongful death case on very short notice.

Mr. Aiken became the managing attorney of Aiken & D'Angelo (one of the predecessors to Aiken & Boles) in 1990. Since that time, he has assembled and coached many talented lawyers with hundreds of cases tried to verdict collectively by his attorneys. Even with changes in the defense landscape, he has maintained a stable of trial attorneys who average nearly 20 years of experience each with substantial longevity at his office. He has served as an instructor with NITA and as an arbitrator with the San Diego Superior Court.

While cultivating the talents of his lawyers, he has raised two great children, Tyler and Jourdyn, with his wife of 24 years, Cyndy, a teacher. He and Cyndy enjoy surfing with Tyler and cheering for Jourdyn at her volleyball and soccer games in addition to family ski and snowboard vacations.

Mr. Aiken may not be playing linebacker anymore, but he remains active by golfing and staying fit. He played in the California State Amateur Championship Tournament at Poppy Hills in 2005 and is a regular fixture at major charity golf events. His partner, Darin Boles, maintains dibs on Mr. Aiken as a ringer in the annual Voices for Children and San Diego Defense Lawyer Tournaments. Mr. Aiken has also served on the Board of Directors for the San Diego Humane Society and the San Diego Defense Lawyers.

THE BOTTOM LINE

Case Name: Salim v. Dr. Michael Halls
 Case Type: Alleged Malpractice - Extensive Scaring after Breast Reduction/ Lack of Informed Consent
 Court: Honorable Joan Lewis
 Plaintiff's Counsel: Andrew Dunk, III of Dunk & Associates
 Defense Counsel: Clark Hudson of Neil Dymott Frank Harrison & McFall
 Length of Trial: 5 days
 Verdict: Defense

Case Title: Baccaro v. Hines
 Case Number: GIC855181
 Judge: Honorable Nevitt
 Plaintiff's Counsel: Steven Gnau of Law Office of Steven Gnau
 Defendant's Counsel: Richard A. Guido of Aiken & Boles
 Type of Incident/Causes of Action: Case arose from a two car, minor impact, rear end freeway accident with soft tissue injuries. Plaintiff incurred \$6,284 in medical specials and lost wages. After initially treating in San Diego, plaintiff sought follow up care in New Jersey from two different chiropractors. Liability was admitted but causation and damages were disputed.
 Settlement Demand: \$18,000 at trial
 Settlement Offer: CCP 998 \$5,001
 Trial Type: Jury/Judge Jury
 Trial Length: 3 Days
 Verdict: \$3,919

Case Title: Olson v. Bentley, M.D., et al.
 Case Number: GIC 849085
 Judge: Hon. John S. Meyer
 Plaintiff's Counsel: Michael K. Newlee, Esq. and Peter A. Guerrero, Esq.
 Defendant's Counsel: Daniel S. Belsky, Esq. of Belsky & Associates
 Type of Incident/Causes of Action: Medical Malpractice
 Settlement Demand: \$250,000
 Settlement Offer: 998 offer for a waiver of costs
 Trial Type: Jury/Judge
 Trial Length: 6 1/2 days
 Verdict: Dismissal for waiver of costs before final arguments

Brown Bag Series Summary August 16, 2006

The San Diego Defense Lawyers Brown Bag on "Appellate Civil Writ Practice" featured retired Second District Court of Appeals Justice Daniel Curry as its speaker. The August 16, 2006 seminar was very well attended by our membership and the speaker provided the attendees a wealth of information based upon his years on the Appellate Court and his years as a Los Angeles Superior Court Judge. Here is just a sampling of the information.

Twenty-five percent of writs filed in the Fourth District Court of Appeals are civil. Ninety percent of these are summarily denied by the Court. (In Los Angeles, fifty-five percent of all writs filed are civil, and are accepted for hearing more often than in San Diego). When considering whether or not to file a petition for writ (whether it be for Prohibition, Certiorari, or Mandate), note that if an appeal lies, a writ generally will not. Writs are for emergency/extraordinary situations, and unless irreparable harm can be shown, a petition will be rejected/denied.

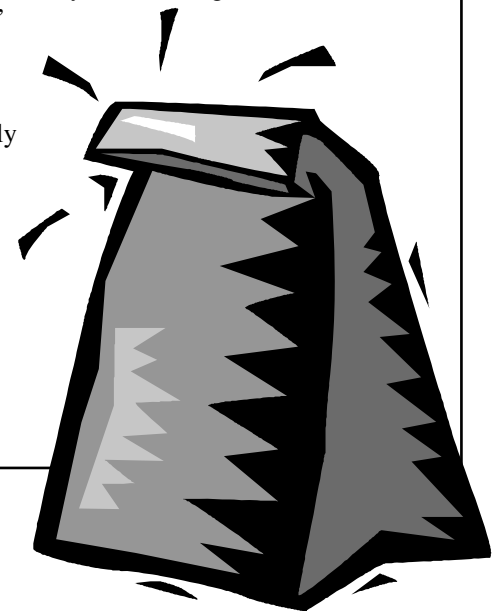
An appeal takes jurisdiction away from the trial court. However, a petition for writ does not. Therefore, unless the attorney requests an immediate stay of the trial court proceedings, the matter in the trial court will remain active.

The manner in which a petition and points and authorities are written can be equally as important as the substance of the matter on which it is based. The Court of Appeal is impressed by words such as, "this is a matter of first impression." There are times when the importance of the subject matter to the bar in general has more weight than the need to show "irreparable harm." Further, Justice Curry notes that writs and appeals have become a bit uncivil. He cautions against "trashing" either the trial court or the opposing counsel. Civility and professionalism is the rule. The Court of Appeal may be offended by anything else. Keep in mind that, in some circumstances, the appellate justice to whom you are writing may be friends with the trial judge who you are "trashing."

The appellant's /petitioner's opening brief is very important. Tell the Court up-front what the case is about. Don't waste your opening brief. This may be your last chance to convince the justices of your position.

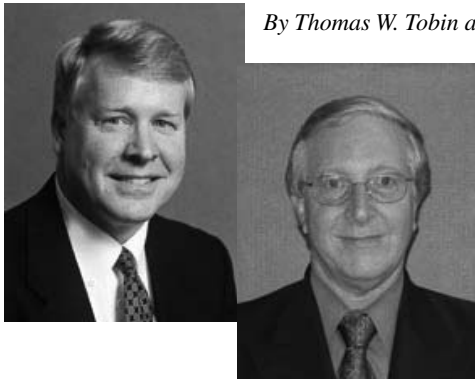
During the course of the appellate procedure, the Court of Appeal will offer oral argument to you. Justice Curry and others agree that the attorney should never waive oral argument. Justice Curry notes that this may be tantamount to committing malpractice. There are things that occur during oral argument that at times change the result. In Justice Curry's Court, one out of twenty-four oral arguments resulted in a change in the Court's "pre-oral argument" tentative position.

In mid 2006, Justice Curry retired from the Second District Court of Appeals. He currently serves as a mediator in the Los Angeles office of ARC (Alternative Resolution Center). The address is 700 South Flower Street, Suite 415, Los Angeles, CA 90017. The telephone number is (213) 623-0211.



Strategic Preparation For "e-Discovery" Under The New Federal Rules

By Thomas W. Tobin and Alan E. Greenberg - Wilson, Elser, Moskowitz, Edelman & Dicker



Changes are coming

On December 1, 2006, revised Federal Rules of Civil Procedure¹ will require all litigants to come to specific and potentially expensive agreements regarding the preservation and production of electronically stored information. These agreements will need to be reached within about 100 days of service of process.²

Businesses must have a plan to shape their preservation obligations and the scope of e-discovery. If a business routinely backs up its electronic systems on digital tapes for disaster recovery purposes, it will need to decide and advise its adversaries very early in any litigation if it will not be searching these tapes for potentially relevant electronic information. However, once the litigation has begun (or even once it is suspected that litigation will ensue), companies will likely still need to preserve such tapes. Failure to adequately comply with electronic discovery requests or defend the protocol for doing so may be very, very costly. Lawyers need to explain to clients that adopting the "Columbo" approach of feigning ignorance of all things electronic will likely no longer be a winning strategy.

In litigation, there is sometimes an irresistible impulse to ferret out evidence of what people were thinking, talking and writing about before issues became issues. Businesses must understand that e-mails, memos and letters thought to be long gone never are completely gone. During the 1986 Iran/Contra scandal, Oliver North thought he could simply "delete" his White House e-mail. In 1999, Bill Gates never thought that his own e-mails would be the keystone of the Department of Justice's evidence in antitrust litigation against his company. In 2003, Arthur Anderson in-house counsel Nancy Temple never thought her e-mail to the audit team in Houston reminding them to follow document retention procedures³ would be the death

knell of one of the largest accounting firms in the world. Remember, it is estimated that 60% of all corporate data resides in or is attached to e-mail.⁴

But e-discovery not only involves e-mail. Electronically stored information is found in things like:

- Word processing files
- Voice mail
- Spreadsheets
- Cad drawings
- Databases
- Instant messages
- Web pages
- Videos (MP4s)

The business world has relied upon electronically stored information for many years. Such information has been discoverable in litigation since as far back as 1970 when FRCP 34(a) was amended to include "data compilations." But it was not until very recently that lawyers began focusing on electronically stored information and courts began to regularly confront related e-preservation, scope, cost and privilege issues.

In order to best understand how these issues arise, one must appreciate that e-documents live in their own *native*⁵ format. The documents are both "persistent and dynamic." Referring to them as "persistent" means they are hard to get rid of, and referring to them as "dynamic" means that every time they are accessed, amended or printed, an electronic trail is left. Perhaps for that reason there have actually been more *spoliation*⁶ cases in the past 10 years than in the preceding 200 years combined.⁷

There is also extra allure and fear associated with e-documents. The e-documents that haunted Oliver North, Bill Gates and Arthur Anderson were considered to be sexy "gotcha" type documents. But, there is the hidden *metadata*⁸ to be considered, an electronic trail that reveals so much more about the creation, modification and access of documents.

The upcoming e-changes to the federal rules

In September 2005, the U.S. Judicial Conference approved the most significant changes that have taken place to the Federal Rules of Civil Procedure in many years. The U.S. Supreme Court approved the changes in April,

unless U.S. Congress intervenes, the changes will take effect on December 1, 2006. The changes will effect the following federal rules:

- FRCP 16, 26 & 34
- FRCP 33
- FRCP 34(a) & (b)
- FRCP 37(f)
- FRCP 45
- Form 35

Among the reasons for the rule changes is the increasingly problematic environment created by unrealistic expectations regarding the preservation and production of electronically stored information. Combined with increasingly aggressive spoliation sanctions, authoritative guidance was needed regarding the type of electronic data and/or information which is and which is not discoverable. Also, there was a desire to hold businesses accountable for failures to preserve and adequately search electronically stored information. In the final analysis, there are huge strategic benefits in knowing the practical effect of these rule changes.

The need for active supervision

Realistically, the new rules will not change the responsibilities of companies regarding the preservation and production of electronically stored information. The changes will force attorneys, who otherwise might not be inclined to delve into the e-discovery arena, to make broad requests for e-preservation and production at the very onset of even the most minor matters.

U.S. Southern District of New York Court Judge Shira Scheindlin issued cautionary instructions in *Zubulake IV*⁹ that provide useful guidance to both litigants and their lawyers grappling with e-discovery issues:

"A lawyer cannot be obliged to monitor her client like a parent watching a child. At some point, the client must bear responsibility for a failure to preserve. At the same time, counsel is more conscious of the contours of the preservation obligation; a party cannot reasonably be trusted to receive the "litigation hold" instruction once and to fully comply with it without the active supervision of counsel."

This "active supervision" must include:

- **Understanding a client's document retention policies and practices**

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Membership is open to any attorney who is primarily engaged in the defense of civil litigants. Dues are \$90/yr for attorneys in practice less than one year and \$120/yr for attorneys in practice more than one year. The dues year runs from January through December. Applications can be downloaded at: www.sddl.org

THE UPDATE is published for the mutual benefit of the SDDL membership, a non-profit association composed of defense attorneys.

All views, opinions, statements and conclusions expressed in this magazine are those of the authors and do not necessarily reflect the opinion and/or policy of San Diego Defense Lawyers and its leadership.

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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Strategic Preparation For "e-Discovery" Under The New Federal Rules

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Lawyers will need to get up to speed quickly to understand the retention policies of the company. The lawyer will need to know what documents and electronically stored information are potentially relevant to the litigation and may be at risk of routine destruction. This is important! It is necessary to know how those policies are put into practice and if audit compliance is conducted.

• Defining the scope of preservation & production

Company lawyers will want to identify time-frames, key players and key player groups as soon as possible. Will the litigation involve only past documents or also those yet to be created? Are the key players a finite, easily-defined group, or are they more amorphous, possibly having changed, or still changing, over time? Is the key-player-electronically-stored-information limited to only certain types of data? ¹⁰ Where is the data? How about any unstructured data? Using this information as a guide, first decisions about the types and locations of electronically stored information to be preserved should quickly follow.

• Initiating litigation holds to key players

A company's lawyer will want to place these key players on formal written notice of a litigation hold. That notice will inevitably include the obvious who, what, why, how and how long, as well as admonitions about how important it is that these documents be retained. It should be made clear that the litigation hold obligation is a shared responsibility of the company and the employee personally.

• Reissuing these holds, overseeing compliance and possibly auditing compliance

The case law is clear that the best practice is to periodically re-issue the written litigation holds to remind the key players of their responsibilities. There is a strong suggestion in the case law that compliance should be audited.

• Understanding a client's systems and retention architecture

This is likely the most controversial result of the rule amendments. Do trial lawyers

really have to wade into the mechanics and vocabulary of the Information Technology (IT) area? On the one hand, it is unrealistic to think that many lawyers ever understand, much less become strategically conversant in, the differences between operating systems and application software as they relate to back-up strategies, archiving systems and other critical preservation processes. On the other hand, if a company's lawyer does not speak the language and know the landscape, they may find themselves on the sidelines listening to their adversary convincing the court in an annoying, off-hand manner, that it is not only technically feasible, but rather straightforward and appropriate to both preserve and search broad categories of electronically stored information.

• Communicating directly with key players

The case law suggests that there is a duty for lawyers to communicate about preservation and production directly with the key players. It seems that the more egregious the conduct of a corporation appearing to ignore or actively violate its preservation duties or related court-orders, the more likely the court will be critical of any lawyers involved, inside or outside the corporation.

• Keeping detailed preservation and production records

Expect that no matter what is done, it will be challenged as too little, too late. Litigants will be well served to keep detailed records of exactly what was to have been preserved and produced, and why. They should routinely go back to basics to make sure that everyone is working together to accomplish that business goal. Do everything possible to avoid the question: "Where did we go wrong?"

Before the Case Management Conference

The new rules require swift action almost immediately after the complaint is served. In less than 100 days, ¹¹ company lawyers will be sitting across the table from an adversary that must be assumed to be e-savvy. An in-house counsel may have even less time to determine who the key corporate players are, how many and what kind of documents will likely be at issue and whether the outside counsel is up to the task of representing the company in an early spirited discussion on the scope of e-discovery. A conclave needs to be called with the discovery team to make sure everyone is familiar with the issues. The team should include:

- Inside counsel
 - Outside counsel
 - Information technology staff
 - Records managers
 - “Key players” associated with matter
 - Outside e-discovery consultants
- At a minimum, this group will consider:
- Key player groups / organization charts
 - Proposed stop/start timelines
 - Initial ideas for key words
 - Key data types used by key players
 - Enterprise data and system maps
 - Overview of back-up systems
 - Overview of e-mail systems
 - Key player metrics for e-mail & unstructured data
 - Key data metrics for e-mail & unstructured data

The goals of this group will be (1) to craft a discovery plan that is reasonable; and (2) to prepare lawyers to defend the reasonableness of the plan against both a knowledgeable adversary and an adversary that may not understand the vocabulary, much less the technical feasibility, of broad demands to preserve and produce.

At the Case Management Conference

The Case Management Conference contemplated by the new rules is an opportunity to strategically shape the type and amount of e-discovery and the associated costs. Although the early costs will likely be significant, the early focus will inevitably allow a better overall e-strategy and reduce the likelihood of inadvertent destruction that may lead to spoliation sanctions. The goal for most defendants should be to craft an e-discovery plan that is consistent and comprehensive across all related litigation such that significant long-term cost savings are achieved. Ad hoc efforts almost always cost more!

The specific topics to be addressed at the conference include:

• Timing

Lawyers should try to ensure that everyone involved appreciates the direct relationship between the focus and scope of the requests and the time and effort needed to comply.

• Preservation: who, what, where & how

Company lawyers will want to use the theories of proportionality and marginal discovery utility to define good faith efforts and to establish the cost-shifting line. Remember that tens of thousands of dollars can be saved if it is possible to limit the preservation obligations to items it makes sense to preserve. Remember that it is just as important to come away

from the conference with a clear idea of what everyone has agreed will not be done as what will be done. If a lawyer comes out of the conference with any doubt about a company’s preservation obligations, err on the side of caution and preserve broadly.

• Types of data

A good company lawyer will use the key player concept, supplemented by organization charts, to suggest limitations on whose data is at issue. Lay out a smorgasbord of data types and key applications. Make the best pitch possible as to which data types are logically at issue and which are not at issue. Use issue-related timelines to further limit the scope of the data. Explain (if necessary) the disaster-recovery, system-restoration function of back-up tapes and explain why the preservation and involvement in the search for relevant information is both unnecessary and extortionately expensive. Hopefully, the presentation will suggest that if discovery does extend unnecessarily to such media, it must inevitably lead to cost-sharing discussions.

• Depositions

Depositions of a company’s IT staff may be avoidable if a lawyer displays a commanding vocabulary and working knowledge of a company’s system architecture. A knowledgeable lawyer may be in a position to argue that the time and effort entailed with depositions might be better used on well-drafted interrogatories.

The cost may be high, be prepared

Business needs to take the lead in crafting the overall strategy and pushing that strategy out to litigation counsel. When it comes to strategic decisions, neither lawyers nor businesses should default to outside e-discovery vendors! If a company is not actively involved with an eye toward a long-term e-discovery strategy, it is likely to be led astray, responding to well-intended advice from individual litigation counsel focused on putting out whatever fires are blazing from Idaho to Maine. This is dangerous, as well as expensive and inefficient.

Spoliation of electronically stored documents yields very serious consequences. It is almost impossible to defend against allegations of spoliation without a well-organized and audited document retention policy. Courts have long since lost patience with lawyers who are uninformed about their client’s e-policies and procedures. Some courts have found that even the perception of “purposeful sluggishness” in responding to demands

for electronically stored information can be enough to generate spoliation sanctions.¹²

As an inside counsel, be wary of outside counsel that has no structured approach as to how e-discovery should be conducted. Lawyers need to be wary if they feel a sense that responsibility for the e-discovery aspects of the case are being delegated late in the day or too far down the food chain.

Company executives need to encourage their e-discovery team to be on the lookout for irregularities, faults or errors as electronic information and documents are sifted and reviewed. Make sure there is a plan in place for proactive, comprehensive and uniform corrective action within the process when it is needed. As the review process unfolds, anyone on the team should be empowered, and indeed encouraged, to pull the cord and stop the bus in order to evaluate the need for corrective action.

Some businesses welcome the upcoming e-challenges – particularly those requesting electronically stored information! For those of us more involved with the *production* of such information, advance preparation is going to be the key. Assemble the team now. Begin by taking the IT staff to lunch.

Conclusion

There are approximately 300 vendors offering e-Discovery services of various sorts. It appears that four of the vendors have a majority of the business. Their websites, which include not only information but useful sample documents as well, are as follows:

<http://www.krollontrack.com/ediscovery/>
<http://www.lexisnexis.com/applieddiscovery/>
<http://www.fiosinc.com/>
<http://www.eedinc.com/>

FOOTNOTES

¹ The amendments are available at: www.uscourts.gov/rules/EDiscovery_Notes_.pdf

² ii Rule 26 requires that the parties meet and confer as soon as practicable but in no later than 21 days before a scheduling conference is held or a Scheduling Order is due under Rule 16(b). Under Rule 16(b), a Scheduling Order, in turn, must be issued no later than 120 days after service or 90 days after the filing of the first responsive pleading, whichever comes first. This is the Rules Committee’s way of putting us all on notice that the parties must meet and confer within 99 days after service or 69 days after the first responsive pleading (whichever comes first). Simplicity itself!

2006 San Diego Defense Lawyers Mock Trial Competition

FOOTNOTES

Continued from page 7

³ The text read: "Mike - It might be useful to consider reminding the engagement team of our documentation and retention policy. It will be helpful to make sure that we have complied with the policy. Let me know if you have any questions. Nancy."

⁴ The Stakes Have Never Been Higher, *The National Law Journal*, July 17, 2006, Stephen Whetstone & Michael Simon.

⁵ The production of a document in "native" format means as a digital computer file, as opposed to a printed hardcopy document or as a "static" or scanned image of a printed hardcopy document. The latter are sometimes referred to as PDF (Portable Document Format) or TIFF (Tagged Image File Format) files, a reference to the suffix identifying them. Native format/digital files will include computer-generated, application-specific information about the file itself, known as "metadata," that may reveal information about who authored the document, who accessed it, what changes were made and when, who printed the file and much, much more. There can be as many as 300 "fields" of potentially available metadata for any single document. Documents in native format are also more easily and accurately searched by computer than are documents in other forms. These native-format documents can actually be searched by metadata field. One example might be to generate a grouping of all files authored by a particular person.

⁶ Historically, spoliation required a finding that there was an obligation to preserve the evidence at the time it was destroyed, that the destruction took place with a culpable state of mind and that it was reasonable to think that the evidence would have supported the claims at issue. This definition, however, has eroded.

⁷ A Lexis search reveals more than 300 matters involving spoliation claims from January of 1996 to 2006. Compare this to less than 150 spoliation claims in the preceding 200 years.

⁸ See Endnote 3, *supra*.

⁹ *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 433 (S.D.N.Y. 2004).

¹⁰ Unstructured data is data that lives outside the Document Management System. It may include data on personal computer hard drives, laptops, home computers, Blackberries, etc.

¹¹ See Endnote 3, *supra*.

¹² *Residential Funding v. DeGeorge Financial Corp.*, 306 F.3d 99; (2nd Cir., 2002).



Hastings College of Law



McGeorge School of Law

SDDL 16th Annual Mock Trial Competition

The SDDL Board of Directors would like to thank all who supported the 16th Annual Mock Trial Competition by serving as judges at the competition held on October 19-21, 2006. Several schools participated, including Hastings, Pepperdine, USD, Chapman, McGeorge, Brooklyn, Whittier, California Western, Southwestern, St. Johns, and Fordham.

The students participating in the competition were extremely well prepared, and many demonstrated excellent advocacy skills. 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. This year's competition presented evidentiary and courtroom skills issues in the context of an elder abuse case. Competitors were required to represent the plaintiff one night, and the defendant the next.

A reception for all student competitors and the SDDL "judges" was held Friday night following the second round. The final four teams and four teams receiving "honorable mention" were announced at the reception. After the second round, teams from California Western, McGeorge, Hastings and Southwestern advanced to the final day of competition.

The final rounds were held Saturday October 21, at USD. The SDDL Board of Directors deeply appreciates the use of the USD facilities. Ultimately, California Western prevailed over Southwestern in the final round, taking home the trophy.



Southwestern University School of Law



California Western School of Law

A FEW TIPS TO IMPROVE MEDIATION EFFORTS

By Joseph Samo - Mediation Offices of Joseph Samo



One of the main challenges to settling legal cases expediently is the unreasonable expectations of the client. It is essential for legal counsel to show their client the bigger picture, acknowledging their concerns and needs, but addressing the feasibility of their desired outcome. An opportunity for resolution presents itself in the form of a focus group.

Tip # 1: Hire a focus group to predict how a jury would rule.

A focus group can be formulated from a voluntary pool of citizens to attend a mediation meeting. Legal counsel from

both sides can present their case to the focus group, which they would treat as prospective jurors should their case go to trial. At the conclusion of the mediation, the focus group would deliberate and report back to the bench with their recommendations. In such a situation, legal counsel would rely on the focus group as another tool of persuasion for their client as they weigh the need and desire to pursue litigation. As this would be comparable to a jury of their peers, the client may be more apt to take heed of the focus group's recommendations, than just the advice of their counsel.

The formation of the focus group can be done with very little expense. It may be devised simply by placing an advertisement in the newspaper, online, or in trade publications. Their participation, thus, is voluntary and can be compensated with a modest rate \$ 15 an hour; the client would be billed for the focus group's service, billed as part of attorneys' fees. It is easier than expected to get a small focus group together: I have been able to gather interest for all sorts of tasks simply by posting ads on www.craigslist.org or asking my students if they would be interested.

Focus groups work for cases that are based on disputes of fact, accountability of negligence, the amount of damages, and causation. Their infusion in the legal process would give clients a unique perspective on their case. Clients usually do not have access to such an impartial opinion until the case goes to trial; at this point, such advice may be too late if it goes against the client and they lose their case.

Tip # 2: Draft a detailed analysis of what can go wrong if the case does not settle.

Give the client an analysis of what can go wrong in trial. Basically, the judge or jury can make important rulings against your client. An adverse ruling can make all the difference in the world. Attorneys' fees rules and court costs can add enormous fees to a client. In some cases, litigants do not access all the possible negative outcomes.

I was involved in a case where the defendant would not settle for \$ 45,000 because she thought the worst that could happen was that she would pay a little more than \$ 45,000. She ended up paying \$ 82,000 to the plaintiff, about \$ 1,000 to the court, and over \$ 60,000 for attorneys' fees. Although her attorney tried to inform her, she never knew it could be that bad. Had her attorney wrote a detailed memorandum explaining how bad it could be, she would have been more likely to settle the case.

As an added incentive, giving your client an analysis of what can go wrong might help settle the case in addition to asserting a defense against a malpractice claim in the future. Clients have sued their counsel by claiming they were never informed that they could lose the case and have to pay higher than expected costs.

Tip # 3: Explain to the client that even a victory in trial will be worse than an immediate settlement.

Even if the case goes right and you win in trial, the client needs to know that the case is not close to being over. If the plaintiff wins, the defendant may file an appeal or make other legal maneuvers to make collection difficult. Defendants generally get more aggressive in not paying a judgment after losing in trial than if there was a settlement agreement.

In addition to having options to delay payment, a defendant may be in a different economic situation after trial and an appeal. A defendant may be solvent today, but insolvent in the future. In 2002, I was involved in a case where a plaintiff refused to quickly accept a reasonable settlement from K-Mart. After a longer than necessary litigation process, K Mart filed bankruptcy before she collected a penny. Had she settled earlier, she would have been in a better position to collect. Litigants don't see it coming – even a solvent defendant could go bankrupt overnight.

As for defendants, delaying settlement can be costing as well. Even if a defendant wins at trial, many things can go wrong afterwards. Among other things, (1) plaintiffs can appeal the case, (2) the trial costs may have been substantially more than the settlement costs, (3) banks may not finance defendants if the lawsuit is not resolved, (4) defendants may have duties of disclosing the on-going lawsuits to investors and potential purchasers of the defendant-company, and (5) insurance companies may increase premiums for paying high litigation costs.

It is a strange concept – a victory tomorrow might be worse than settlement today. Some unreasonable clients might not understand that principle.

Tip # 4: Tell the client to focus on what a judge and jury will likely rule, not on what's rule or wrong.

The client needs to understand that the courtroom is not a place where apologies are granted and people feel better. For example, one litigant may be more moral than another litigant but still lose the case. There can be complex evidentiary rulings, procedural rulings, solvency issues, statute of limitations arguments, and a lot of other legal issues that will complicate who has the better moral argument. A lot of clients, especially the non experienced litigants, will equate the settlement figures with morality. For instance, I handled a case where a small business owner refused to pay for violations of the Americans with Disabilities Act because she thought she was "very nice to disabled people" and that she "did her best to accommodate them". In reality, the business owner was correct - she did do her best. However, she was nonetheless in violation of the law for minor reasons, and it had to be explained to her that even though she was a moral person that was doing her best – she had to settle the lawsuit to avoid further payments. She had to know that settling the case did not mean she was an immoral business owner.

Many attorneys do not take the time to explain the law, and explain the policy behind the law. When clients start learning about the legal system and the importance of detailed procedural rules, they will be more likely to settle the case.

For more information regarding improving your chances of obtaining a settlement, you can contact Joseph Samo directly at (619) 672-1741 or at Joseph@SamoMediation.com.

EXTRA!!! Member News EXTRA!!!

White & Oliver is pleased to announce the addition of new associate **Lawrence A. Ward**. Mr. Ward was born in Harrisburg, Pennsylvania on November 22, 1975. He was admitted to the bars of the Commonwealth of Pennsylvania, the State of New Jersey and the United States District Court for the District of New Jersey in 2003, and the California State Bar in 2006. Additionally, Mr. Ward was admitted to the United States District Court for the Eastern District of Pennsylvania in 2004. He was educated at the University of Notre Dame (B.A., 1998; M.Ed., 2000; J.D., 2003). Mr. Ward is a member of the American Bar Association and the International Franchise Association.

Hughes & Nunn has relocated to: 401 B Street, Ste. 1250, San Diego, CA 92101. Phone and fax remain the same.

The San Diego office of **Jampol, Zimet, Skane and Wilcox** has added the following new associate to their San Diego office: **Ian Wood** earned his B.A. in Literature from California State University, Hayward in 1997. During college, he received a full scholarship to study at Waseda University in Tokyo, Japan for one year and is fluent in Japanese. Prior to going to law school, he worked as an engineer at Openwave Systems, Inc. in Tokyo, Japan. He earned his J.D. at Golden Gate University School of Law in May 2005 and was admitted to practice law in California in December 2005. While in law school, Ian was a published member of the Golden Gate University Law Review and earned Witkin Awards in Criminal Procedure and Appellate Advocacy, and a CALI Excellence for the Future Award in Contracts. He also worked as a judicial extern for the Honorable Joseph C. Spero, U.S. Magistrate for the Northern District of California.

Jennifer Bosse received her B.A. in Communication from the University of Washington in 2002. She graduated from the University of San Diego School of Law in 2005. During law school, Jennifer interned for the U.S. Attorneys office in their civil division and for the Honorable Thomas J. Whelan for the United States District Court, Southern District of California. Jennifer was also a Comments Editor for the San Diego Law Review. Jennifer was admitted to the California Bar in January of 2006 and is a member of the San Diego County Bar Association.

Kent H. Thaeler joins the firm with almost 15 years of experience in civil litigation, most of which has been focused on the prosecution of construction defect claims. He attended University of California San Diego before obtaining his J.D. from National University School of Law in 1991. While in law school he was nominated to the Student Honors Board by the Dean and received Tuition Scholarship based on his high entrance test scores and upon the recommendation of United States Senator Jeff Bingaman of the State of New Mexico.

Allasia Brennan received her B.A. in Liberal Arts and Spanish from the University of San Diego in 2002. While in college, she studied abroad in both Toledo, Spain as well as the Canary Islands. She graduated from California Western School of Law in 2005. Throughout law school she was employed by the University of San Diego English Department as a graduate tutor where she helped MBA law students write papers and articles. In 2004, Allasia clerked for the United States Department of Agriculture, Office of the General Counsel in San Francisco. After law school, Allasia clerked for Nevada's longest sitting District Court Judge – the honorable Peter I. Breen in Nevada's Second Judicial District Court. Allasia is an active member of the California and Nevada State Bars.

Quelie M. Saechao received her B/A/ in Liberal Arts from the University of California David in 1999. While in college, she studied abroad at the University of the West Indies. Quelie earned her law degree from California Western School of Law in May 2004, and was admitted to the California Bar in December 2004. Prior to law school, worked in the finance industry as a registered securities representative with NASD. Quelie is admitted to practice before the Ninth Circuit Court of Appeals and the U.S. District Courts for the Southern Eastern, and Northern Districts of California.

Wilson, Elser, Moskowitz, Edelman & Dicker has relocated! The new address is 655 West Broadway, Suite 900, San Diego, CA 92101. Phone (619) 321-6200 and Fax (619) 321-6201 remain the same.

*Mike Belote and
Clark Hudson*



4th Annual "Legislative Update"

San Diego Defense Lawyer members and guests gathered in the Broderick Room of the San Diego County Bar Association on October 25, 2006 to hear legislative advocate Mike Belote of California Advocates discuss the current state of the law and the possible impact of recently adopted legislation on the legal landscape of 2007. Mr. Belote's annual participation and continued support of San Diego Defense Lawyers' efforts to keep members "up-to-date" in this area is greatly appreciated. Held each October, this program is consistently rated "A+" by those in attendance and is one you will want to calendar for 2007.

COLLECTING DEBTS FROM EMPLOYEES



(It's Not As Easy As You Think!)

*Hugh A. McCabe
Neil, Dymott, Frank, Harrison & McFall*

If you are like many employers, giving employees a loan or advance on their next paycheck is something you will do to help the employee in need. Usually employers deduct the money from future paychecks or, in the event the employee leaves, they may try to recoup all of the funds owed from the final paycheck. Without following the law, collecting employee debts in this regard can result in employers being on the wrong side of more litigation. Penalties and attorney's fees drive these types of claims. Knowing how and when to collect employee debts is crucial in avoiding these situations.

California law strictly limits the manner in which an employer may deduct debts or damages owed by employee(s) from his or her wages. Debts or damages often arise because of a loan, advance on income, an overpayment of wages, the loss or damage of equipment, tools, etc.

Loan/Debt:

Generally, employees may pay off indebtedness to employers by a written agreement authorizing the deduction of certain sums from their wages. If an employer is operating under such an agreement, the employer may not deduct from the employee's final paycheck the unpaid balance of a large debt owed to the employer. The law in this area mandates an employer cannot deduct the balance of money owed from the employee's final paycheck (a "balloon payment") without a separate written agreement signed by the employee at the time of his or her receipt of their final paycheck. Absent this second agreement, employers will need to operate under their original agreement provided they put it in writing. If a former employee stops paying on the loan, employers are usually forced to go to small claims court to try to recoup their debt. In evaluating whether or not an employer wants to proceed in this fashion, they need to look at the economics of the situation to determine whether or not it is worth while to pursue an ex-employee for monies owed. Employers would be well-advised to make sure they did not violate any laws in the manner they collected the funds against the employee. This can quickly result in a counter-suit by the employee for violation of the Labor Code seeking attorney's fees.

Damage to Property:

In California, employers are not allowed to deduct from the employee's wages those amounts of funds they deem are appropriate to compensate the employer for lost or damage caused by an employee's negligence. These types of losses, must be borne by employers as a cost of doing business. The exception to this rule relates to damages the employer incurred as a result of an employee's gross negligence, willful misconduct, or dishonesty.

Sometimes employers have employees who intentionally damage employer property or steal from the employer. When this occurs, employers may deduct from an employee's wages those amounts necessary to compensate for the damage or losses resulting from this employee's misconduct. These deductions can be made from an employee's wages both during employment and from the final paycheck. No written agreement is necessary to allow an employer to make such a deduction. Employers need to be cautious, however, in

deducting amounts relating to these claims. Should an employee take the employer to the Labor Board, the Labor Board will place the burden on the employer to demonstrate it suffered damages or losses as a result of the gross negligence, willful misconduct or dishonesty of the employee. If the employer is unable to clearly demonstrate these facts, the employer could be liable for unpaid wages, with penalties.

Overpayment to Employees:

Employees may not timely turn in their timecard for a recent pay period worked. Despite their failure to timely turn in a time card, employers are required by law to timely pay their wages. In this situation, employers should pay the employee's estimated wages and inform them there may be overpayment since a determination could be accurately made whether the employee worked full time during their normal work week. Employers should then aggressively determine the exact hours the employee worked. If the employee was overpaid, employers should either have the employee repay the "overpayment" or sign an agreement allowing the employer to deduct those sums from the next paycheck. (As noted above, employers cannot make this deduction without a written agreement signed by the employee.)

Compliance:

In an effort to fully comply with the laws relating to debts and losses owed by employees, employers need to evaluate their own internal policies to make sure they are in compliance with the law. If employers are going to provide loans or "advances" to employees, they need to create an agreement outlining payment plans and the right of the employer to deduct such sums from the employee's paycheck. This writing must be signed by the employee.

Agreements to reimburse employers for simple negligence or loss, are generally not going to be upheld. When employees decide to leave while owing money, the employer will need a separate written agreement signed by the employee giving the employer the right to deduct any and all outstanding funds from the final paycheck. If compensation is still owed to the employer, all efforts should be made to amicably collect the funds. When things break down, employers need to cautiously evaluate the efficacy of pursuing their former employer in Small Claims Court. In making this decision, they need to look at the value of the debt and their own policies to make sure they have complied with the law. Failure to do so could result in the employer owing the employee more than the employee owes the employer.

Compliance with the law in this area is simple provided you have some standard written agreements. Check with your counsel to make sure they reflect the current status of the law.

2007 Membership Dues are Due

2007 Installation Dinner

RSVP NOW!

U.S. Grant Hotel - "Casino Night", Saturday January 27th

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