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The Path to Justice: How Jurors Process Information

Although jurors are tasked with a unique and formidable decision-making responsibility, their information processing strategies are the same as in many other decision-making contexts. Attorneys often believe that they can stretch jurors' motivation and capabilities for information processing due to the significance of their case. However, like in many other decision-making arenas, jurors are 'cognitive misers' and their information processing tendencies should serve as a buoy when preparing to navigate the perilous waters at trial.

Jurors' Information Processing Tendencies

Whereas only a minority of jurors are motivated to pay close attention to all of the information presented during trial, the majority are less concerned with tracking what can be an overwhelming amount of detail. Moreover, jurors are different with respect to their information processing capabilities. Some jurors are able to attend to, comprehend, and organize substantial amounts of information, whereas other jurors become easily confused when they are confronted with a large corpus of evidentiary information. A common characteristic of all jurors, however, is that they prefer information to be simplified and thematic.

Certainly, the nature of a legal dispute will affect jurors' motivation to devote their undivided attention to attorneys' presentations during trial. A criminal trial teeming with sordid details is likely to capture jurors' attention as opposed to a long and pallid anti-trust case. Even an interesting business torts case chock full of 'vivid and juicy' testimony will lose its hypnotic hold on jurors if the trial drags on for a substantial period of time.

We often hear clients remark that, "If the jurors would just listen to the message I am trying to give them, they should have no trouble finding for my client." If it were that simple, trial consultants would be reading the Want Ads. To many attorneys, jurors information processing and decision-making appears to be capricious and lacking a rational foundation. It is disheartening to many attorneys that jurors do not seem to hone their attention on the details of the evidence presented. Jurors do have a rational and logical format for processing and organizing information — a story. However, the manner in which jurors piece together the story may not always comport with attorneys' expectations.

When jurors are motivated to attend to the

details of attorneys' arguments and witnesses' testimony, they are using systematic processing. Systematic processing occurs when jurors devote the substantial cognitive energy necessary to attend to the details of the attorneys' and witnesses' messages (e.g., arguments, facts, opinions and evidence). Stated differently, jurors use systematic processing when they base their individual or psychological verdicts upon the message-based information they learn during the trial. By contrast, heuristic processing refers to situations in which jurors use 'cognitive rules of thumb' for evaluating evidence and testimony. Heuristics are non-message based cues (e.g., credibility, representativeness, availability, simulation, nervousness) that jurors use as a basis for evaluating arguments, evidence and testimony. Because heuristics require significantly less cognitive energy to process information than systematic processing, jurors overwhelmingly prefer to process information and base their decisions on heuristics.

Stories are jurors' preferred method of organizing information because they simplify their cognitive task. Heuristics information processing works well for jurors because it is consistent with their preference for thematic presentations. Heuristic processing often appears to be irrational or illogical to attorneys because it is not the logico-deductive model lawyers hope for. Nonetheless, it is the cognitive posture assumed by jurors and it serves them well. Jury research provides an opportunity to study how jurors' heuristics affect jurors' understanding of the case.

Although some jurors may start out at trial trying to digest the 'informational feast' prepared by the attorneys and witnesses, jurors will quickly become satiated by the information overload and rely on heuristic processing as the preferred cognitive strategy for arriving at their individual verdicts and damage assessments. Because information overload quickly sets in for jurors even in a short trial, jurors opt for a less cognitively demanding strategy for evaluating the relative merits of each side's case. Heuristics are like 'cognitive shortcuts' that jurors use so as to simplify their daunting task of tracking, organizing, and evaluating a seemingly voluminous body of material.

Heuristics

Jurors rarely make a conscious decision to use heuristics to simplify their cognitive tasks during trial. Rather, heuristics just 'kick in' automatically, much like a default option in computer software, when jurors perceive very little vested interest in processing courtroom proceedings, or become overwhelmed by an enormous body of information. Moreover, even if jurors get caught up in their

Ins & Outs

Mike Neil of Neil, Dymott, Perkins, Brown & Frank was appointed a vice-president of the prestigious Federation of Defense and Corporate Counsel (FDCC).

Dana M. Reeder of Bacalski, Byrne & Koska eloped to St. Lucia in May and has changed her name to Dana M. Pustinger. Not to be outdone, the firm also committed itself to a new relationship and changed its name to Bacalski, Byrne, Koska & Ottoson. Gary Ottoson, formerly a managing partner at Haight, Brown & Bonesteel has been named partner in charge of new office space in downtown Los Angeles. Ottoson has over 33 years experience in large complex trials including *Hinckley v. PGE* (of Erin Brockovich fame) and *Directo v. Johns-Manville*, the second asbestos case tried in California. He is a Fellow of the American College of Trial Lawyers, a member of American Board of Trial Advocates and past President of both the Association of Southern California Defense Counsel and California Defense Counsel. Also joining Mr. Ottoson is Ellen Hurley from the Haight firm. She is a 14 year attorney with expertise in contamination, employment and free speech matters.

civic duty when sworn in by the court and hang on every word during opening statements, the effect is ephemeral and, before long jurors are using heuristics as the cognitive cipher for understanding case storylines and evaluating witnesses.

Although there are a number of heuristics that affect jurors' decision-making, the current discussion will focus on a few of the cognitive shortcut that play a more prominent role in affecting jurors' decision making as a trial unfolds. Three heuristics have emerged as having a substantial impact on jurors' evaluation of evidence, arguments, witnesses, and attorneys: (a) credibility, (b) representativeness, and (c) availability.

Credibility. The credibility of the source is arguably the most significant heuristic employed by jurors. It is the most significant for two reasons: (a) it is invoked most frequently by jurors, and (b) it exerts the most influence on jurors' evaluations of attorneys' arguments and witnesses' testimony. Credibility is a multidimensional construct consisting of five components: (a) expertise or competence, (b) character or trustworthiness, (c) sociability or likeableness, (d) composure or nervousness, and (e) extroversion or outgoingness. Jurors often pay little attention to what a witness has to say, but weighs the value of the witness' contribution based on his/her credentials and/or communicative ability. Rather than hang on every word of a witness' testimony, jurors prefer to sit back and say to themselves, "She is a top expert, whatever she says must be true." Or, jurors may evaluate the witness according to how they communicate, "He really seems very relaxed and comfortable, he must be telling the truth."

Jurors weigh the relative importance of the five dimensions based upon the role of the individual (attorney, expert witness and fact witness) and the nature of the case. For example, in medical malpractice suits, jurors' concerns regarding the physician are focused almost exclusively upon his/her competence and likeability. Although jurors want to know that the physician was well-schooled and trained, jurors most often evaluate a physician based on his/her likeability - their perception of the doctor's 'bedside manner.' Because jurors often decide medical cases based on a physician's likeability, witness preparation sessions assume a key strategic position in counsel's and consultant's case preparation.

A majority of jurors come to the courtroom distrusting members of the legal profession; their evaluations of counsels' credibility is determined almost exclusively by his/her conduct during trial. Jurors expect attorneys' to be overly aggressive when advocating their client's position, especially when questioning witnesses during cross-examination. By showing witnesses respect and proper deference, attorneys gain invaluable currency toward their credibility.

Attorneys who attack a witness or use sarcasm toward witnesses and opposing counsel only

reinforce jurors' already dim view of attorneys and, as a result, undermine their client's case while elevating the value of the witnesses' testimony. For example, impeaching a witness is a painful process for the witness and the jurors. The jurors empathize with the witness' public humiliation. When jurors perceive that attorneys derive a sadistic pleasure from their triumph over a witness, they hold this against the attorney, and the attorney's client (DecisionQuest, 2000).

Because of their credentials, the war of experts can be won before a rhetorical shot is fired on the courtroom battlefield. However, even the most credentialed expert must be believed by the jury. Despite the fact a witness may be telling the 'truth,' jurors may doubt the veracity of the witness due to his/her composure under fire. To be sure, jurors expect some degree of nervousness from witnesses. Jurors rely to a large extent on a witness' verbal and nonverbal behavior to evaluate the veracity of a witness (deTurck & Miller, 1985; deTurck, Feeley & Roman, 1995; Feeley & deTurck, 1996).

Representativeness. The representativeness heuristic is tied directly to how we characterize or stereotype other people and situations. The question jurors ask themselves is: "How likely is it that Person A or Event B is a member of Category X?" For example, jurors may ask how likely is it that the physician (person) is honest (category)? Jurors answer this question by matching up the characteristics of Person A with the defining characteristics of Category X. There is no universal set of category-defining characteristics used by all jurors.

For example, a witness may be introduced as with an impeccable reputation. However, if jurors believe that the witness 'looks shady,' and they perceive a lack of eye contact and a nervous tremor in the voice, they are likely to question the veracity of the witness. In other words, the behavior and appearance of the witness was representative of their defining characteristics of a deceptive witness (deTurck, Texter & Harszslak, 1989). Jury research is a most useful vehicle for revealing the defining characteristics most often used by jurors.

In the case of an event, e.g., an individual injured by a product, jurors may find the manufacturer liable because of the fact that there are a small number of other similar accidents. Despite the fact that the manufacturer has taken laudable precautions in the design and manufacture of the product, as well as warning consumers of potential hazards, jurors often may perceive that other similar accidents to be indicative of a problem with the product. Stated differently, the prevailing defining characteristic in this example is the fact that jurors believe that several similar accidents are representative of a defective product and, therefore make the attribution that the manufacturer is negligent, despite the fact that accident

rates associated with the manufacturer's product may be extremely low, e.g., 5 in 10,000,000.

The representative heuristic permeates jurors' decision making in other practice areas as well. In a fraud case, for example, jurors often determine if a fraud was committed based on their personal defining characteristics for what constitutes a fraud, as opposed to instructions from the bench. Jurors simply compare the alleged fraudulent actions with their own individual defining characteristics of fraud. If the actions exceed a certain threshold, the jurors determine there was fraud. Some jurors may require only that an entity made misrepresentations to decide there was a fraud without caring a lick whether the misrepresentations were material or relied upon. To these jurors, there is only one defining criterion that matters, someone was not totally honest.

Availability. Availability refers to situations in which jurors' judgments are affected by information that is most easily recalled. Because jurors base their decisions on only a fraction of the information presented during trial, their evaluations are affected to a large extent by the ease with which they can recall information. In other words, jurors do not base their verdicts and damage awards on all of the information presented during a trial; rather, they base their decisions on the information which is most easily recalled. Thus, jurors base their decisions on only a fraction of the information they are exposed to; a small portion of the information which most readily jumps to mind.

There are several factors that play a role in the relative effects of availability: visual/graphic information and repetition. Jurors prefer visual/graphic information because it requires less cognitive effort than textual information. Moreover, graphic information is substantially more vivid than pallid textual information and, as a result, is more easily recalled. Simple graphics with an "instantaneous take-away" message exert a substantial impact upon jurors' evaluations of evidence, testimony and arguments. To the extent that jurors must expend a great deal of cognitive effort to understand a graphic, the effect of the visual is likely to be minimal, if in fact jurors do not completely "turn off" and ignore the graphic display. It is imperative that graphics have a simple, easy to understand message that can automatically be deduced by jurors.

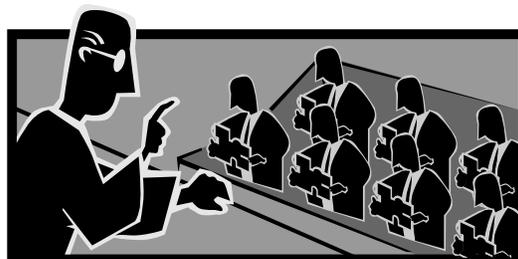
Repetition also plays a role in the availability of information for jurors because repeated information is processed more deeply by jurors. Depth of information processing refers to the number of cognitive links a juror makes between a specific piece of evidence, and other information presented during trial, including a witness. As evidence is processed more deeply, more links are created with other evidence, testimony and arguments. In other words, repeated information becomes more centrally linked in a cognitive network of trial

information. The more a given piece of evidence, testimony or argument is linked with other information, the more likely it is to be recalled if any other piece of information in that network is recalled due to the number of close cognitive links formed by the juror. Research generally indicates that three repetitions produce the most positive persuasive outcome. Additional repetitions run the risk of causing jurors to evaluate the information negatively due to overkill or overload. The negative reactions by jurors to the too-oft repeated information will spread to other evidence put on by counsel because of the cognitive networking by jurors.

In summary, jurors are cognitive misers who evaluate witnesses and evidence based to a large extent on cognitive shortcuts or heuristics that simplify their decision-making task. Despite the fact that heuristics may at times appear to be irrational to attorneys, they are a very logical strategy for jurors. Jury research can provide invaluable insight as to how jurors are processing key information. The results of the research can provide key strategic insight as to how to position certain information so as to maximize its persuasive efficacy.

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Ins & Outs

Lincoln, Gustafson & Cercos has added Erin M. Ferguson and Jill S. Dickerson as associates in their San Diego office. Both are native San Diegans who received their J.D. from the University of San Diego. Ms. Dickerson received her undergraduate degree from San Diego State, and Ms. Ferguson received hers from McCallister College in Minnesota.

The Law Offices of Kenneth N. Greenfield has moved from its 8-year existence in UTC to the Rancho Bernardo area. Ken was inducted into ABOTA this year and has recently added Jill Grathwohl as an associate in his office. Ms. Grathwohl's primary areas of practice are insurance bad faith litigation and general civil litigation in the areas of commercial, construction defect and personal injury/product liability. She received her Juris Doctor degree from City University of New York School of Law in 1997, and her LL.M. from The University of San Diego School of Law in 2000. Jill was formerly an associate with The Lendrum Law firm and served as an extern law clerk to Justices Charles A. LaTorella and Edwin Kassoff of the New York State Supreme Court.

Ins & Outs

Grace Brandon Hollis LLP has two new associates. Aisha Shelton Adams joined the firm in August to work with Graham Hollis and Coleen Lowe on product liability and construction defect cases. Aisha is a recent graduate of the University of Iowa Law School and is awaiting California bar results. Eugene "Skip" Shank is a new bar admittee who starts September 3rd. Skip is currently a senior engineer with Boyle Engineering. He will be working principally with Thomas Byron in the defense of design professionals.

CAMPBELL, SOUHRADA & VOLK announced that Mr. Shawn Robinson, Mr. Scott Stonehocker, and Ms. Eileen Luttrell have joined the firm as associate attorneys. Mr. Robinson will staff the San Diego Office and Mr. Stonehocker and Ms. Luttrell will staff the Las Vegas Office.

John C. Pytel has recently joined Koeller, Nebeker, Carlson & Haluck as an associate in the San Diego office. John's practice focuses on insurance coverage disputes and complex, multi-party construction defect litigation. John earned his undergraduate degree from the University of Wisconsin-Madison and his J.D. from USC Law School.

President's Message

By: John Clifford
Drath, Clifford, Murphy, Wennerholm & Hagen

Summer is over and before the blink of an eye, it will be the end of the year. It seems that with every year, the days and months slide by faster and faster.

Fall is also a time to reflect on one's accomplishments of the year and goals for the future. This Fall is a particularly good time for reflection, as we approach the one year anniversary of the horrific tragedy of September 11, 2001. As I am sure you will recall, once one learned of the horrible events, it caused us all to pause and to take stock in our personal and professional lives. The recent passing of Thomas M. Dymott, who was awarded the Inaugural SDDL "Lawyer of the Year" award in recognition of his outstanding contribution and service to the Civil Defense Bar of San Diego also causes me to reflect.

It is with those thoughts in mind that I would encourage each of our members to become more proactive in both their membership within the San Diego Defense Lawyers Association and as practicing attorneys.

As you will hopefully recall, a little more than year ago, the SDDL began collaborating with the San Diego Volunteer Lawyer Program to provide lawyer volunteers with an emphasis on elder abuse cases within the County of San Diego. While that program continues, the San Diego Volunteer Lawyer Program encompasses a broad spectrum of issues, many of which involve standard representation of clients in areas of consumer fraud, civil rights, and foster care. Additionally, the SDVLP will soon be handling due process hearings for special education cases involving the various school districts within the County. SDVLP also provides clinics and needs volunteers to assist those in need of legal guidance. I would strongly encourage each of you to become involved. Please contact Jerry Polansky at the SDVLP. He can be reached at (619) 235-5656, ext. 113.

I would also encourage our membership to become active in the San Diego Defense Lawyers. We will soon be requesting nominations for board membership for 2003, and I would strongly encourage individuals to participate with the wonderful individuals who are currently on the board to keep this a great organization for the benefit of civil defense lawyers in San Diego.

In closing, I hope you enjoy a wonderful fall and I look forward to seeing you at upcoming SDDL events, including the golf tournament to be held later this month, as well as the Moot Court Competition to be held in October, and our continuing legal educational seminars.



Juror's 'New Math:' How Jurors Calculate Damages

Jurors' calculus for awarding damages is arguably the most idiosyncratic facet of the deliberation process. Although jurors' haggling over damages often appears to be irrational at first blush, there is a logic underlying their methods and the outcomes. Understanding jurors' rationale for damage awards can be most useful in determining if an alternative damage presentation is advisable or tailoring a damages argument to a jury so as to enhance its persuasiveness.

Individual vs. Group Dynamics

Individual Dynamics

Due to the spate of news coverage on high profile cases over the years, jurors have psychologically adjusted to hearing about large damage awards. Jurors' individual evaluations of damages are strongly affected by the figures plaintiff's counsel tenders during trial. Jurors have a psychological latitude of acceptance for damage awards, or a range of damage figures, they are willing to entertain. To the extent plaintiff does not ask for a damage figure that exceeds jurors' latitude of acceptance, many jurors will trust plaintiff's damage request as a reasonable sum. Thus, many jurors use plaintiff's damage request as an anchor for evaluating or comparing defense's damage figure, if an alternative damage theory is proffered.

Jurors' individual assessments of damages can vary greatly for a number of reasons. Jurors' experiences and attitudes are the most important factors influencing their individual damage assessments. Jury research is an effective tool for identifying jurors' experiences and attitudes that differentiate punitive from non-punitive jurors. By using jury research to identify the decision path jurors follow to arrive at their damage awards, defense counsel can better plan a strategic response to overcome jurors' tendencies.

Although there is not a single set of defining experiences or attitudes that characterize punitive jurors across all cases and venues, several trends have emerged from our research. Jurors who have experienced a recent trauma in their life (e.g., divorce, separation, loss of a loved one, victim of crime) tend to be more punitive than their peers who have not had similar experiences. In addition, jurors who perceive that they have been victims of some injustice, whether at work or in another context, are likely to be more motivated to award higher damages than other jurors.

Jurors' personalities also exert a substantial influence on their desire to award damages. Jurors with an authoritarian personality are more likely to be punitive than jurors having a different personality type. Individuals with an authoritarian personality have a low tolerance for mitigating circumstances or ambiguity and a rigid adherence to social hierarchies. As a result, jurors with a

high authoritarian personality believe that deviations from the rules of expected behavior (individual or corporate) should be punished. Jurors high in dogmatism are very similar to those high in authoritarianism, but are more apolitical. They perceive issues and people in 'black and white' with no shades of gray.

Group Dynamics

Two psychological processes affecting jury damage awards during deliberations are the *polarity shift* and the *groupthink* phenomena. 'Polarity shift' refers to situations in which a group makes a more conservative or riskier decision than the aggregate of the individual juror's decisions. There are two primary factors that underlie the polarity shift phenomenon: (a) social comparison, and (2) persuasive arguments. Social comparison refers to the time when jurors first begin to discuss case issues during deliberations and they learn of the other jurors' attitudes. Jurors compare their own opinions to attitudes of the other jurors as a means of seeing how they 'fit in' the group. Some jurors hold back on expressing their damage awards for fear that they may be too extreme (small or large) and would not fit in with their peers. However, when jurors learn that others in the jury advocate similar or even larger damage awards than they do, they become more psychologically comfortable with awarding more extreme damage figures. As a result, the jurors as a group become more secure with awarding a larger damage figure than they decided upon as individuals prior to deliberations.

Persuasive arguments refer to the fact that as jurors deliberate, they hear novel arguments from their peers that they had not previously considered. During deliberations jurors unveil their personal positions on the issues, evidence and testimony. As a result of hearing new arguments from other jurors, the critical mass of jurors' attitudes regarding key issues increases until it achieves a threshold from which it is nearly impossible for jurors to overcome.

The *groupthink* phenomenon was so named as a result of the Kennedy administration's debates over the Bay of Pigs debacle. All of the government officials included in the debate tended to think alike with very few dissenting opinions. Groupthink in a jury occurs when the jurors take a vote and all, or almost all of the jurors feel the same way. This may effectively circumvent jurors' motivation to discuss the relative merits on both sides of the case. Few jurors want to invite attacks on themselves by others because they are holding out. The result is that jurors pay only token lip service to the evidence, testimony, and arguments presented by one of the parties. Taken together, *groupthink* and *polarity shift* account for why a jury's damage award is sometimes substantially greater than the average of the individual juror's damage awards.

Trends

We have observed a number of trends in how jurors factor in a variety of issues during their deliberations. Although the court rarely allows jurors to hear arguments regarding the role of workers' compensation, insurance, and fees in plaintiff's damage requests, some good defense jurors raise these factors during deliberations in an effort to hold damages down. By contrast, plaintiff-oriented jurors have been inflating damage awards because they believe that the award will be reduced when appealed. This is a relatively new trend, whereas solid plaintiff jurors have long been advocating for an increase in damage awards so as to ensure that plaintiff has enough money after contingency fees are taken out.

Sometimes jurors' calculus for computing damages is nothing more than holding an auction. The foreperson may merely act as an 'auctioneer' starting off the 'bidding' at an agreeable figure, e.g., one million dollars, and throws out escalating dollar amounts as individual jurors continue to agree to a higher damage figure until the bidding stops. It can be a most daunting lesson to observe one of these auctions as the damage award jumps from one \$100,000 to \$5,000,000 in a matter of a minute or two. Moreover, in a situation like this, if only one juror agrees to a higher figure, the auction continues. In other words, the foreperson does not seek to determine if all the jurors agree to each new figure thrown out for bid; rather, the foreperson continues the auction until finally, none of the jurors can support such a large damage figure.

Because jurors may be more concerned with avoiding conflict than holding damages down, some juries get caught up in a feeding frenzy of awarding damages.

In a recent jury research project, I observed several of these factors working in concert to devastating effect. The foreman held an auction and the award jumped from \$250,000 to \$10,000,000 in only a minute or two. Afterward, the lone holdout defense juror sarcastically mentioned that if the jury really wanted plaintiff to get \$10,000,00 they should award \$20,000,000 because of the attorney's contingency fee. Not one juror picked up on his sarcasm and the foreperson mentioned that it was a good idea and asked if anyone objected to going to \$20,000,000. No one objected and in a matter of two minutes, the damage award increased exponentially. In fact, the award increased eighty-fold!

Compromising With Damages

Jurors use damages to achieve a compromise in a number of different ways. For many jurors, the need to get along with their fellow jurors is an overriding consideration. To be sure, deliberations can get very heated and personal. However, jurors are highly motivated to maintain a civil atmosphere during deliberations and will go to great lengths to achieve that goal - even if it means giving a little bit more in order to reach a compromise.

THE BOTTOM LINE

Case Title: Gabriel Rosas, Mary-Bell Rosas, as husband and wife; Linda Torres, an individual; Wanda J. Filbin, an individual; Elizabeth E. Shick, an individual; Errol H. Curl, Kathleen G. Curl, as husband and wife; George A. Pastrana, Maria A. Pastrana, as husband and wife; John Hoover, Karen Hoover, as husband and wife; Josephine Silva, an individual; Dana Daly, an individual; Josephine C. Long and Kathleen A. Robinson, as co-trustees of the Long Family Trust; and Judith Marsh, an individual v. Aztec Homes, a business entity, form unknown, Signs & Pinnick, a business entity, form unknown, Tom C. Dyke, an individual dba Tom C. Dyke Drilling & Blasting, a business entity, form unknown, and DOES 1 through 50, inclusive.

Case No.: San Diego Superior Court, Case No. GIC749077

Judge: Hon. Geary D. Cortes

Plaintiff Counsel: Patrick J. Stark and James A. D' Ambrosio, Law Offices of Patrick J. Stark

Defense Counsel: Sean T. Cahill of Balestreri, Pendleton & Potocki

Type of Incident: Property damage, emotional distress for fear, anxiety and apprehension related to blasting operations at a nearby housing development

Settlement Demand: \$707,000

Settlement Offer: None

Trial Type: Jury

Trial Length: Seven (7) days

Verdict: Defense verdict - 16 plaintiffs

THE BOTTOM LINE

Case Title: Tuchscher v. Lennar Corp., et al.
 Case No.: San Diego Superior Court, GIC758620
 Judge: Hon. Sheridan Reed, Dept. 68
 Plaintiff Counsel: Andrew S. Albert and Joel R. Wohlfeil, Boudreau, Albert & Wohlfeil
 Defense Counsel: John T. Farmer and Dennis S. O'Neill, Farmer & Case
 Type of Incident: Business tort case involving claims of inducing breach of contract and intentional interference with prospective economic advantage relating to defendants' claimed interference with plaintiff's exclusive negotiating Agreement with the City of Chula Vista to develop a 127 acre multi-use commercial/residential project on the Chula Vista Bayfront with a build-out value claimed at \$587,000,000. Co-defendant City of Chula Vista settled before trial for \$850,000. Co-defendant, former Port Commissioner David Malcolm, was dismissed before trial on a successful Anti-SLAPP motion, the ruling on which is on appeal
 Settlement Demand: \$34,000,000, reduced to \$17,000,000 before trial
 Settlement Offer: \$700,000, increased to \$2,000,000 before trial
 Trial Type: Jury
 Trial Length: 5 weeks
 Verdict: \$2,200,000, subject to post-trial motion for offset of City's \$850,000 settlement.

Reaching a Verdict

Jurors frequently use damages as a bargaining chip to gain leverage or break an impasse during deliberations. Holdout defense jurors who will not concede on liability often use damages to advance their persuasive agenda. These jurors suggest to their peers that they will switch and find for the plaintiff if the panel agrees to limit damages. Plaintiff-oriented jurors frequently agree to limit damages so as to achieve their persuasive objective - a win on liability.

Retrofitting Verdicts

Juries are notorious for retrofitting verdicts to fit their damages decisions. More specifically, in personal injury and product liability cases, I have observed numerous juries in our research find for the defendant in terms of liability. However, when they reach the 'bottom line' for damages, they suddenly reverse their position because they feel the plaintiff deserves some money. This is common in personal injury cases in which where neither the defendant nor the plaintiff were overtly negligent and liable for the plaintiff's injuries. Jurors harbor a need to take care of the plaintiffs in these kinds of cases. All too often my clients, have prematurely declared victory during a research exercise when the mock jury finds for the defendant on liability - only to observe an abrupt overturning the verdict because the mock jury wants to take care of the plaintiff by awarding some level of damages. Jurors retrofit their verdict to be consistent with their desire to award some level of damages to the plaintiff.

Alternative Damage Arguments

Due to the outcome of the Pennzoil-Texaco litigation, my clients frequently want to present an alternative damage figure to jurors in an effort to counter plaintiff's counsel from exerting a unilateral influence on jurors' damage awards. However, when defense has a good case on liability, defense's alternative damage figures often exacerbate the problems confronted by defense because they 'cut the legs out' from under the good defense jurors. Jurors often react very negatively to alternative damage figures because jurors teetering on their evaluations of liability believe that when defense offers a substantial sum of money while denying liability, they are, in fact, admitting liability.

Alternative damage figures frequently raise the persuasive hurdle too high for strong defense jurors to overcome. It causes defense-oriented jurors to think that the defense has doubts about its own case. As a result, the defense runs a risk of paying damages in a case in which it may have prevailed on liability. Rather than presenting an alternative damages theory in a close case, defense is best served by attacking plaintiff's theory during cross-examination of its experts.

Conversely, in cases in which defense is handicapped by a weak case on liability, an alternative damage presentation can be very

effective. An alternative damage figure arms strong defense jurors with a bargaining chip they can use during deliberations to hold damages down. When defense has a weak case on liability, it is critical to provide defense jurors with an alternative damage theory so as to outfit them with a persuasive weapon they can use against strong punitive jurors.

It should be noted that alternative damage theories should not be complex. Jurors are not motivated to understand convoluted damage theories. They prefer simple 'easy to digest' theories with 'tangible' damage figures. Jurors rarely possess the mathematical savvy to process elaborate damage theories.

Because jurors often use plaintiff's damage figure as an anchor in deciding damages, it has a very potent effect on them. However, if plaintiff seeks a sum that exceeds a critical threshold, jurors often re-evaluate the plaintiff's credibility. Advocating an excessive damage award often results in what is known as a 'boomerang effect.' Plaintiff's damage appeal then has the opposite intended effect - jurors will actually award less damages. Recently, one of my clients was defending an employment case in which plaintiff was seeking an excessive amount in damages and, as a result, won only a very small fraction of what was sought. To be sure, juries are not reticent about awarding large damages. However, the damage award must be consistent with the fact pattern.

Effects of September 11, 2001

There are a number of schools of thought that have emerged regarding the effects of the terrorist attacks on jurors' damage awards. The terrorist attacks may influence jurors' damage awards differently depending on a variety of factors including, but not limited to the venue, nature of the litigation, and the characteristics of the litigants.

One school of thought holds that generally, the terrorist' attacks are likely to have one of two effects on juries. First, due to the tremendous economic impact of the attacks, it is likely that jurors will exhibit more of a 'team' attitude when evaluating damages in civil cases. In other words, many jurors will not view themselves on the opposite end of a political continuum from corporate America. They will tend to view all of America, corporate and consumer, as a team that must hang together in these most turbulent times if we are to pull ourselves out the economic mess that was created in the wake of the attacks. Thus, rather than juries having an 'us versus them' attitude when evaluating corporate America, they are more likely to be motivated to protect corporate America. Jurors are keenly aware of just how fragile the economy is; many of them have personal experience with layoffs resulting from the downturn in the economy due to the attacks. Jurors may still award damages, but be less punitive in the amount they award. Thus, jurors may be more

willing to try to be fair to defense so as not to push a corporation over the financial brink and exacerbate the already poor economic situation.

Jurors are also likely to view personal injury, medical malpractice, and products liability cases in a similar light. Jurors may use the horrific images of the carnage caused by the attacks as an anchor for evaluating plaintiffs' damage claims. If jurors do use the aftermath of 9/11 as an anchor for evaluating pain and suffering, many plaintiffs' damage claims are likely to be perceived as far less severe than the catastrophic loss experienced by the Americans killed or injured in the attacks. Indeed, jurors may minimize damage awards when compared with the atrocities perpetrated on innocent people on September 11, 2001.

A second reaction that is likely is for jurors to become more polarized or extreme in their damage awards. Although some many jurors may be more forgiving of corporate infractions following September 11th, if jurors sense that a corporate entity intentionally violated a standard of conduct, they may very well become more punitive toward the transgressor than they otherwise would have been prior to September 11th. In other words, if jurors perceive that someone on the 'American team' is taking advantage of another 'American teammate' jurors are likely to take it upon themselves to sanction the corporate transgression severely. In an already bleak economic situation, jurors are not likely to sit idly by while a 'corporate teammate' takes advantage of one of an already suffering citizenship. This unpatriotic behavior is likely to draw the ire of jurors more so than it would have prior to the attacks.

It is difficult to project how long jurors will be influenced by the images of 9/11. The fear of future attacks, and the role of the media in keeping the images in front of the public are likely to make the effects of 9/11 linger in the minds of jurors for a while. Jury research has long been an invaluable tool in revealing jurors' reactions to case themes, witnesses, and evidence. Given the uncertainty of jurors' reactions to 9/11, the need for jury research greater than ever.

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TREATING PHYSICIANS: Potential Scope of Trial Testimony

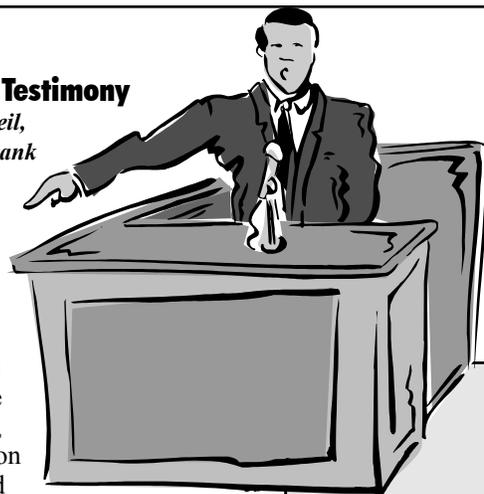
By: Lynde Selden III, Esq., Neil,
Dymott, Perkins, Brown & Frank

Expert testimony is defined in California Evidence Code Section 801 as: opinion testimony related to a subject matter "sufficiently beyond the common experience", based upon information within the special training, knowledge, skill, experience, or education of the testifying witness, and could assist the trier of fact. Based upon this definition, it seems implicit that a treating physician, a person clearly trained in a particular field of medicine, should be able to provide an expert opinion. As it turns out, this implication is born out by the case law.

California Code of Civil Procedure Section 2034 delineates between treating physicians and retained experts implying both may offer expert opinions.

CCP Section 2034(a)(1) requires parties to a lawsuit to exchange the names and addresses of any person from which a party intends to elicit an expert opinion as evidence at the time of trial. Importantly, 2034 (a)(2) delineates between any person who will offer an expert opinion at the time of trial and an expert who will testify from a party that is "an employee of a party" or "retained by a party."

Section 2034, subsection (f), describes differing procedures for the exchange of information regarding experts differentiating between those who have been retained, as in Section 2034(a)(2), or others, as in Section 2034(a)(1). Specifically, 2034(f)(1)(A) requires a party to set forth the name and address of any person who may offer an expert opinion at the time of trial while subsection (f)(2) requires, if this expert is a retained expert as in Section 2034(a)(2), the expert witness list be accompanied by a declaration from a party's attorney providing qualifications, general substance of proposed testimony, an affirmation that the proposed expert will agree to testify at trial, an affirmation that the proposed expert is familiar enough with the case enabling him to render a meaningful opinion, and a provision of the expert's hourly rate. Simply put, a treating physician is not regarded as a retained expert as defined in Section 2034(a)(2). (Schreiber v. Estate of Kiser (1999) 22 Cal.4th 31, 37; Huntley v. Foster (35 Cal.App.4th 753-754, 756; Hurtado v. Western Medical Center (1990) 222 Cal.App.3d 1198, 1202-1203.) **But beware**, the Second District recently ruled that treating physicians listed in the expert exchange as simply "all past or present examining and/or treating physicians," without at least a name identification of the intended experts, was insufficient compliance with



THE BOTTOM LINE

Case Title: Marcello Hernandez, an Individual, and Guardian ad Litem for minors Marcella Hernandez and Marcello Hernandez Jr.; Maria Hernandez, an Individual; and the estate of Rosalva Hernandez, Deceased vs. Lawrence W. Schenden, M.D.
Case No.: San Diego Superior Court, GIC 759741
Judge: Honorable Frederic Link
Plaintiff Counsel: Joseph G. Maiorano, Esq., Maxine D. Kersh, Esq.
Defense Counsel: Daniel S. Belsky, Esq., Belsky & Associates
Type of Incident: Medical Malpractice/wrongful death
Settlement Demand: Plaintiffs' settlement demand before trial was \$500,000
Settlement Offer: Defendant made a CCP §998 offer for zero dollars and a waiver of costs
Trial Type: Jury
Trial Length: 5 days
Verdict: Defense (12-0)

THE BOTTOM LINE

Case Title: Marshall v. The Baldwin Company, et.al.
Case No.: San Diego Superior Court, GIC 725825

Judge: Honorable Kevin A. Enright

Plaintiff Counsel: Stephen M. Strauss, Procopio, Cory, Hargreaves & Savitch

Defense Counsel: Nanette Souhrada of Campbell, Souhrada & Volk

Type of Incident: Construction Defect

Settlement Demand: \$1.9 million

Trial Type: Jury

Verdict: Defense (12-0)

Case Title: Harper v. Hard Rock Hotel, et. Al.

Case No.: Clark County Superior Court, A395208

Judge: Honorable Ron Paraguirre

Plaintiff Counsel: Robert A. Winner, Barker, Brown, Busbie, Chrisman & Thomas

Defense Counsel: William P. Volk and A. David Mongan of Campbell, Souhrada & Volk

Type of Incident: Personal injury, slip and fall. Plaintiff walked past "Wet Floor" sign, slipped and hurt knee. Plaintiff is a hemophiliac who alleged injury created need for genetically engineered product which facilitates clotting and costs thousands of dollars per ounce. Plaintiff alleged need of 3-4 doses per week.

Settlement Demand: \$ 1.7 million plus \$400,000 in attorney fees

Settlement Offer: Offer of Judgment for \$10,000

Trial Type: Bench

Verdict: Defense

the "letter or the spirit" of CCP section 2034, resulting in the exclusion of the physicians' testimony at trial. (Kalaba v. Gray, supra at pp. 1418, 1423; Cal. Civ. Proc. Section 2034 (a)(1); Cf. Schreiber v. Estate of Kiser, supra at p. 31 [Treating physicians were listed in the CCP section 2034 designation placing defendants on notice].)

Extent of Opinions permitted by Treating Physicians:

A non-retained treating physician may testify at trial as both a percipient treating physician and may also offer opinion testimony. A treating physician is distinguished from a retained expert by the context in which he learns the facts of the case, not the content of his testimony. (Schreiber v. Estate of Kiser, supra at pp. 35; Hurtado v. Western Medical Center, supra at pp. 1203.) Accordingly, as long as the treating physician has not gained the information from which her formulates his observations or opinions from the party calling him, but rather within the context of the treatment he has provided, an expert treating physician may express both fact and opinion testimony. (Schreiber v. Estate of Kiser supra at pp. 35-36.)

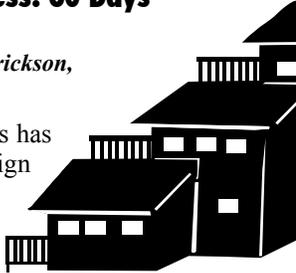
As the court states in Schreiber "[A]s to any opinions formed on the basis of facts independently acquired and informed by his training, skill, and experience...[a treating expert's testimony] may well include opinions regarding causation and standard of care because such issues are inherent in a physician's work." (Id. at pp. 39) This revelation indicates that it is imperative that at the time of the deposition of a treating physician, the party deposing the witness must determine the basis upon which the witness has formed any opinions or observations and whether or not he or she will be expressing any causation or standard of care opinions. It should be noted that if, at the time of their deposition, the treating physician in question has not reviewed anything other than his own records or independent research, and a question is posed asking for an opinion with respect to standard of care or causation, the ubiquitous objection "calls for an expert opinion" is mostly hot air as this objection is clearly unsupported by the law (although it may prompt the witness to reconsider offering an opinion).

Bottom Line with Treating Physicians as Experts:

- 1) Put the names and addresses (if possible) of treating physicians in the expert designation;
- 2) Take the deposition(s) of any treating physician(s) plaintiff has listed in their designation (if not already done)
- 3) Ask the treating physician(s) in their depositions what they have reviewed and whether or not they have formed an opinion as to standard of care, causation or damages.

The New Calderon Process: 60 Days Later

by: Timothy J. Grant of Fredrickson, Mazeika & Grant



The new Calderon Process has brought subcontractors, design professionals, and their liability carriers into the pre-litigation negotiation and discovery process. Enacted in 1996, Civil Code § 1375 created what is commonly known as the Calderon Process. Its scope was, and still is, limited to construction defect claims arising in "common area" developments. These multi-family unit projects seemingly went out of favor in the mid-1990's with Southern California developers, who instead focused on more profitable single family home developments. However, now that the Southern California real estate market is at one of its highest levels, more and more common area projects are being built to meet the demand for affordable housing. Therefore, while the Calderon Process typically has no impact on single family home developments, there is an entire new inventory of projects now being built which will be impacted by the Calderon Process in the near future.

The intent of the Calderon Process was to decrease the number of construction defect cases filed in the court system, and to therefore significantly reduce the costs to the construction and insurance industry of construction defect claims which plagued both industries. However, the original Calderon Process mandated only the inclusion of the HOA and the developer. The subcontractors and design professionals potentially exposed to the developers' formidable indemnity claims were notably absent, as were those parties' liability insurance carriers. The absence of these parties from the process doomed the Calderon Process from the start because rarely was a developer (or its insurance carriers) willing or able to settle with the HOA and then sue the subcontractors and design professionals for indemnity. The recent amendment of Civil Code § 1375 and the enactment of Civil Code § 1375.05, both of which became effective July 1, 2002, were the Legislature's answer to these perceived shortcomings in the Calderon Process.

The insurance carriers potentially included in the new Calderon Process are AI carriers, primary and excess carriers, even primary or excess carriers who have taken a position of "no coverage." Within 100 days of the HOA's first notice to the developer, all parties theoretically could be joined, a special master selected, and a CMO adopted. The initial 180 day term, combined with another added 180 days without unanimous consent of all parties, has remedied the problem of only a 90-day term. (Some may argue that the longer term merely provides the developer even more opportunity to incur recoverable costs and



fees without the trades being able to make a CCP § 998 Offer.) In any case, with the punitive provisions of the newly enacted Civil Code § 1375.05, the new process promises to finally provide a means to enforce participation and compliance of all parties concerned. Those punitive measures which can be taken

against a party for its failure to timely participate in the Calderon Process include the following:

- Waiver of right to select the special master or challenge its appointment;
- Bound by the amount of any settlement reached; and
- Waiver of right to conduct or participate in site testing or inspection.

For several months now, my partner, Billie Jaroszek, and I have been spreading the news about the new Calderon Process to subcontractors, carriers and TPA's in Southern California. The carriers we have visited have raised concerns about how the claims process is to be staffed, and what role counsel will play in the process. This is especially problematic in instances where the carrier views their defense obligation to be triggered by the service of a "complaint" against its insured. In that same vein, the trades raise the concern about their mandatory early involvement, which will force subcontractors to retain counsel at a much earlier time. If a subcontractor cannot be released from the process, is not deemed a peripheral party, and its insurer will not defend it without a complaint, how is it to adequately defend itself or participate in any settlement without depleting its own precious resources?

The yet to be proven benefits of the new process also come with a high cost to the trades. The subcontractors must now share the costs of the process, even if they potentially have only a small amount of liability for the claimed defects. While they always could seek designation as a "peripheral party," they will still be required to participate to some extent and share the costs of the special master. The nature and extent of destructive testing also will undoubtedly present an area of constant dispute for the trades. Until now, the decision by the trades to conduct destructive testing is based entirely on the nature and extent of the testing done by the plaintiff and the developer. Usually, especially with the strict view on extrapolation of defects now being adopted by the trial courts, the less destructive testing conducted, the better the trades' position may be in subsequent litigation. However, the trade's failure to participate in destructive testing during the Calderon Process now may operate to waive that party's right to conduct testing after post-Calderon litigation commences, so the trades, their counsel, and their insurers will be faced with a difficult question on how to proceed in any given case.

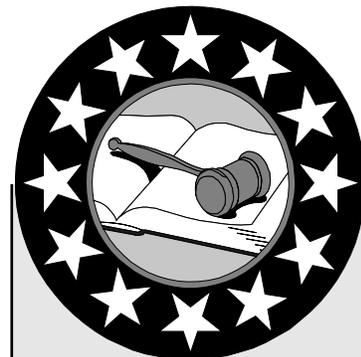
Finally, from both the viewpoint of the insured and the carrier, given the punitive effect of a party's failure to "timely" participate, of special concern is whether a given carrier is an "Insurer," and thus required to comply with the procedures of the Calderon Process. The description provided in the statute of the term "Insurer," whose participation is required under the Calderon Process is as follows:

"insurers, and the insurers of any additional insured... whose potential responsibility appears on the face of the notice..." Civil Code 1375(e)(2).

That broad scope is further described as

"all insurance carriers, whether primary or excess and regardless of whether a deductible or self-insured retention applies, whose policies were in effect from the commencement of the construction of the subject project to the present and which potentially cover the subject claims." Civil Code 1375(e)(2)(A)

Based on the broad scope of the given definition for the term "Insurer," the term "Insurer" would appear to include any carrier which has issued a CGL policy to, or an additional insured endorsement in favor of, any Developer entity, Subcontractor or Design Professional, when such policy imposes upon the carrier a potential duty to defend the insured or indemnify the insured or additional insured (AI) for losses resulting from the type of claims of alleged defects identified in the Initial Notice. This would include primary as well as excess policies, and regardless of whether a deductible or self-insured retention applies.



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THE BOTTOM LINE

Case Title: Phillip Baum vs.

J. Byron Wood, M.D.

Case No.: GIN 014084

Judge: Marguerite L.

Wagner

Plaintiff Counsel: Christine

A. Carlino of Law Office

of Christine A. Carlino

Defense Counsel: Kendra A.

Ball of Neil, Dymott,

Perkins, Brown & Frank

Type of Incident:

Laparoscopic hernia

repair with alleged injury

to the testicle.

Settlement Demand:

\$100,000.00

Settlement Offer: Waiver of

costs

Trial Type: Medical Mal-

practice

Trial Length: 5 day

Verdict: Defense

Thank You

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It is plainly evident that an Insurer with a valid policy exclusion would be exempt from participating in the Calderon Process once it received the Respondent's Notice. The above clause "*all insurance carriers ... whose policies ... potentially cover the subject claims*" leaves a large loophole in terms of whether a liability carrier needs to participate. In the final analysis, should the carrier choose to rely on an untested Montrose-type of exclusion or a "prior known loss" exclusion, it does so at its own peril if the exclusion ultimately is found to not apply. The potential bad faith issues presented promise to open an entire new area of appellate review.

In conclusion, over 60 days after its effective date of July 1, 2002, few if any construction defect claims have been brought forward under the new Calderon Process. It may be that this is just the "calm before the storm," but the more likely reason is that plaintiffs' and developers' counsel are still struggling with just how to most efficiently invoke the new process. In the final analysis, while the updated Calderon Process does address many of the perceived problems of the earlier version, new questions arise concerning its effect on the newly included parties and their insurance carriers. The next year or so should tell us whether or not we have simply traded one set of problems for another, even thornier set of problems yet to come.

San Diego Defense Lawyers Mock Trial Competition Update

Plans for this year's Mock Trial Competition are moving full speed ahead! At this time we have 16 teams confirmed from the following schools:

Western State University College of Law
Hastings Law School
University of San Diego School of Law
Whittier Law School
Pepperdine University School of Law
McGeorge School of Law
Fordham University School of Law
Chapman University School of Law
Thomas Jefferson School of Law

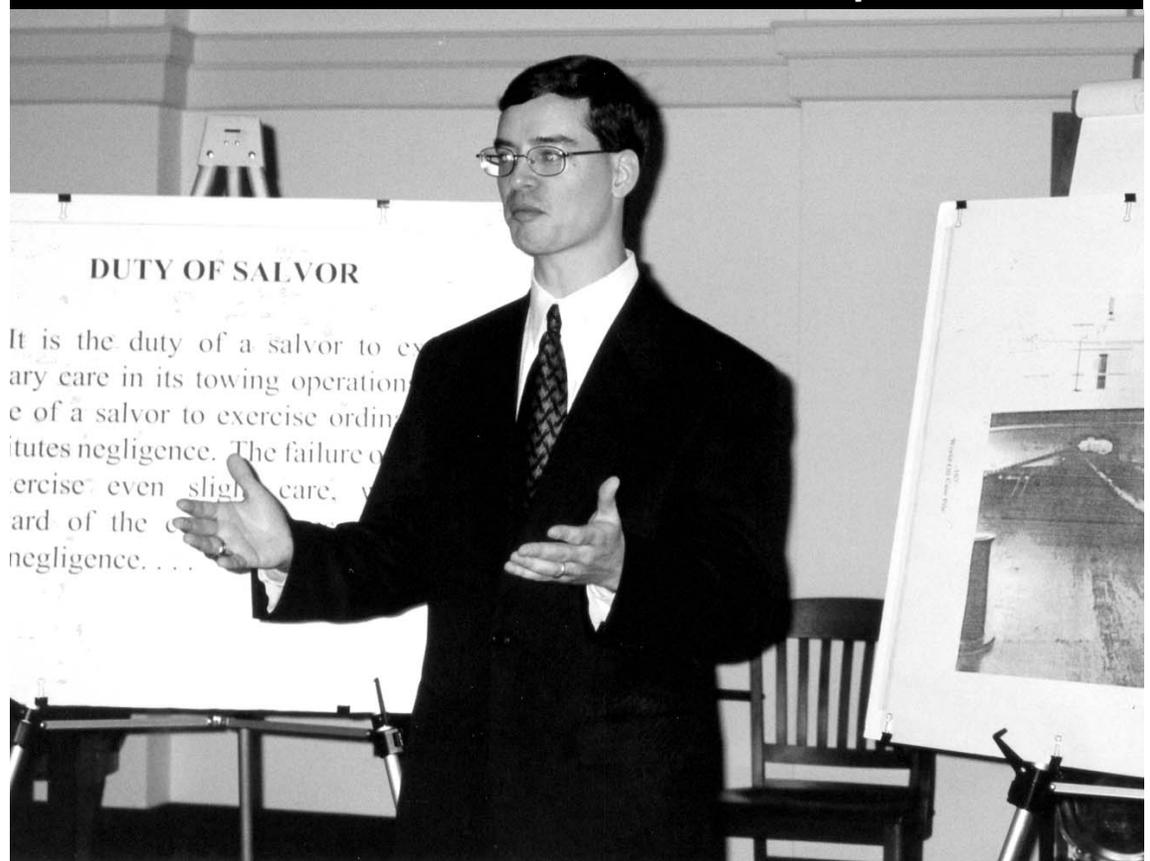
The competition will be held Thursday October 24th and Friday the 25th at the downtown courtrooms with the finals being held at California Western School of Law on Saturday the 26th. This year's case will be particularly interesting as it will involve legal issues arising from a bar fight! Please notify Pete Doody at doody@higgslaw.com if you are available to participate as a judge for this competition.

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We welcome the submission of articles by our members on topics of general interest to our membership. Please submit material to Clark R. Hudson at Neil, Dymott, Perkins, Brown & Frank, 1010 Second Avenue, Suite 2500, San Diego, CA 92101. Phone: 619-238-1712, Fax: 619-238-1562, E-mail: chudson@neil-dymott.com.

Matt Beran of USD's Winning Mock Trial Team Presents Evidence at the 2001 SDDL Mock Trial Competition



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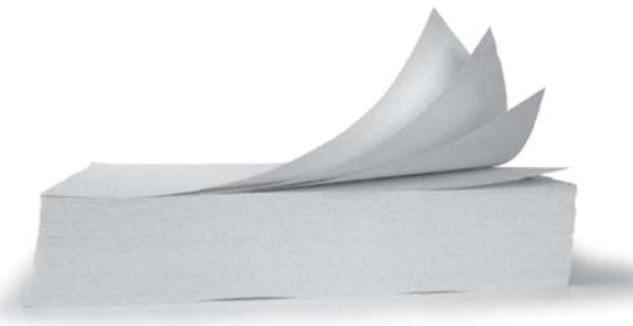
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