THE UPDATE

San Diego Defense Lawyers Association

Fall 2003
Volume 7
Issue 6

Who The Heck Is My Client?

Most attorneys have probably represented an entity at some point or another, perhaps in the context of litigation, or maybe in a transaction, or maybe even as in house counsel or a governmental attorney. But the question is, what does it really *mean* to represent an entity? You can't talk to it. You can't write a letter to it. So how do you communicate with your non-living, non-breathing client? And what special rules are there for "entity representation"? What pitfalls should we attorneys be watching for?

The following is designed to shed some light on the subject, but a comprehensive analysis is required in each specific factual situation:

Who is the client?

Rule of Professional Conduct (RPC) 3-600 says that the "organization" itself is your client. In the case of *Responsible Citizens v. Superior Court* (1993) 16 Cal.App.4th 1717, the court broadly construed the concept of an "organization." The court examined the Webster's Dictionary definition of the word ("any unified, consolidated group of elements; systematized whole; esp., a) a body of persons organized for some specific purpose, as a club, union, or society") in determining that a partnership is an organization. In State Bar Formal Opinion No. 2001-156, the Standing Committee on Professional Responsibility and Conduct further found that RPC 3-600 "is best viewed as applicable to all governmental entities."

How do I ethically communicate with the client?

Most of us communicate through an individual somehow affiliated with the entity. And indeed this is what we're supposed to do. 3-600 basically says that the attorney should communicate through the "highest authorized officer, employee, body, or constituent overseeing the particular engagement." However, if your appointed contact isn't following your advice, or is somehow harming the client, you can go "up the ladder" within the organization to try to fix or report the problem. RPC 3-600(B).

What if my individual contact thinks I'm representing her?

The Rule makes it clear that it is the attorney's responsibility to make sure that the attorney's contact person within the organization understands that the organization is the client, and not that individual, in the event the interests of the two conflict. 3-600(D). The individual must also be clear that the attorney cannot withhold anything that she says from the organization itself.

Can I represent the entity and an individual associated with the entity?

This is possible under 3-600. However, per subdivision E, the attorney must get an executed conflict waiver in accordance with RPC 3-310 if this dual representation is going to take place. Ultimately, despite the existence of a conflict waiver, there may be circumstances that make the continued dual representation too difficult, and the attorney may be forced to resign.

As in house counsel, what the heck do I do?

The case of *Metro-Goldwyn-Mayer, Inc. v. Tracinda Corp.* (1995)36 Cal. App. 4th 1832, cautions in house counsel to maintain the loyalty to the entity at all times. "[A]s attorneys for [a] corporation, counsel's first duty is to [the corporation]...Corporate counsel should of course, refrain from taking part in any controversies or factional differences among shareholders as to control of the corporation, so that he or she can advise the corporation without bias or prejudice...Even where counsel for a closely held corporation treats the interests of the majority shareholders and the corporation interchangeably, it is the attorney-client relationship with the corporation that is paramount for purposes of upholding the attorney-client privilege against a minority shareholder's challenge."

What if my client is a governmental entity?

As discussed above, RPC 3-600 applies to you. State Bar Formal Opinion No. 2001-156 discussed an interesting situation where the city's interests potentially differ from those of a "constituent sub-entity" or a city official. What is the city's attorney to do? The opinion found that this situation does not necessarily create a conflict of interest for the attorney, since the sub-entity or officer isn't really a separate client, but rather the constituent through which the attorney represents the city. The sub-entity may only become a separate client if it has authority to act independently of the city.

How does it work with corporations and their subsidiaries?

State Bar Formal Opinion No. 1989-113 examines a situation where an attorney represents Company A, and also wants to accept representation in a matter where the attorney would be adverse to a subsidiary of Company A. The opinion found that it was acceptable for the attorney to accept this adverse representation under certain circumstances, because- per RPC 3-600- the client is Company A, not the subsidiary. "The attorney owes undivided allegiance only to the corporate entity which he or she represents rather than any affiliated persons or entities."

The article was written by Heather Linn Rosing, a shareholder at the law firm of Klinedinst, Fliehman & McKillop, P.C. Heather serves on the SDCBA's Ethics Committees, and, for a living, defends professionals- including lawyers- in professional negligence cases brought against them. The views expressed in the article are his own and do not necessarily reflect the views of the Office of the Attorney General or the SDCBA Ethics Committee.

In This Issue

THE BOTTOM LINE

Case Title: Ashley McFarland, et al. v. United Dominion Realty Trust, et al.
Case No.: GIN 016769
Judge: Hon. Michael Anello, Dept. 29
Trial Judge: Hon. Jacqueline Stern, Dept. 8
Plaintiffs' Counsel: Joe Dicks, Esq. of Law Offices of Joseph G. Dicks and Eric Hoffland, Esq.
Defense Counsel: Chris Garber, Esq. and Kristin Johnson, Esq. of Klinedinst, PC
Type of Incident: Trip and fall on stairs
Last Settlement Demand: $150,000
Last Settlement Offer: $25,000
Trial Type: Jury
Trial Length: 6 days
Verdict: Defense

Case Title: Cook v. Pardee
Case No.: GIC 769046
Judge: Hon. Kevin A. Enright
Plaintiff Counsel: Robert Bright, Levinson, Bright & Roberts, LLP
Defense Counsel: Robert C. Carlson, Esq. and Stephen Wichmann, Esq. of Koeller, Nebeker, Carlson & Haluck, LLP for the only defendant, Pardee Homes
Type of Incident: Personal injury – brain damage to a mother and her son from alleged "chronic" exposure to carbon monoxide
Settlement Demand: most recent before trial - $8.4 million
Settlement Offer: $150,000 to mother; $150,000 structured to son
Trial Type: Jury trial
Trial Length: 7 weeks
Verdict: Defense – unanimous jury in 2.5 hours

Case Title: Confidential
Case No.: Confidential
Judge: Hon. William R. Nevitt, Jr.
Plaintiff Counsel: Elliott N. Kanter, Esq.
Defense Counsel: Paul K. Schrieffer, Esq. and Carl H. Starrett II, Esq. of Law Offices of Paul K. Schrieffer
Type of Incident: Legal Malpractice
Settlement Demand: $500,000, later reduced to $15,000
Settlement Offer: $5,000
Trial Type: N/A
Trial Length: N/A
Verdict: Case settled for $12,500

President's Message:


Peter S. Doody

In endless pursuit of MCLE credits and to better our skills as defense trial attorneys, we have all attended various seminars, some better than others, put on by such organizations as the San Diego County Bar, American Bar Association (ABA), Continuing Education of the Bar (CEB), Defense Research Institute(DRI) and so on. I am proud to say one of the most professional and informative seminars I have attended was our summer evening seminar entitled "Using Experts to Evaluate Brain Injury Cases." I would like to thank board members Michelle Van Dyke and John Farmer for organizing and presenting this program whose panel included neuropsychologist, Dean Dellis, vocational rehabilitation specialist, Robert Hall, life care planner, Doreen Casuto and economist, Brian Bergmark. This event was first-rate and I think everyone was impressed with the case problem format and the high tech nature of the presentation.

Last year the Westerfield trial grabbed the national spotlight. In the July brown bag seminar, our members were treated to a presentation by lead prosecutors Jeff Dusek and Woody Clark who shared with us their trial strategies, war stories, and what they did to while away the hours during the lenghty jury deliberations. These two gentleman are gifted trial lawyers and we are fortunate to have them representing our community. We ended the summer with our brown bag seminar host, Brenda Peterson of Peterson & Associates, giving us a tutorial on the advantages and intricacies of Live Note depositions.

Looking ahead to October, SDDL is going to have its busiest month in the history of the organization. On the evening of October 9th, at the U.S. Grant Hotel, we are co-sponsoring an evening seminar with Association of Southern California Defense Counsel featuring defense counsel lobbyist, Michael Belote. Mr. Belote will be making a special trip from Sacramento to share with us his thoughts on hot-topic issues and proposed legislation which concerns defense lawyers and affects the way we practice law. Then, on the evenings of October 15th and 16th, we will be sponsoring our 13th annual law student mock trial competition which will culminate in Saturday's final round at USD. What started many years ago as a small regional competition has grown in reputation and stature. Not only do we draw law school teams from throughout the state, but several teams from outside California will be competing as well. Soon you will receive a letter from us asking you to serve as a judge on a three-judge panel for the competition. It's fun, and is a good opportunity to see future young lawyers display well-honed trial skills. Also, serving as a judge may give you valuable insight for your next trial.

On the weekend of October 17th and 18th, as President of SDDL, I will be attending the annual DRI conference in Washington D.C. where I'll be participating in conferences with leaders of other state and local defense organizations from across the country to compare notes and share thoughts as how to best serve our members. Finally, we have saved the best part for the end of October when we will be hosting the SDDL second annual golf benefit at the Auld Course in Chula Vista. The date is Friday, October 24, 2003, at 12:30 PM. Our benefit partner this year is Juvenile Diabetes Research Foundation. We have strategically chosen a Friday afternoon for the golf benefit so you can attend your morning case management conferences, bill a few hours, then take the rest of the day off and play golf with us for a good cause. After all, you deserve it!

Keep up the good fight.

Peter Doody

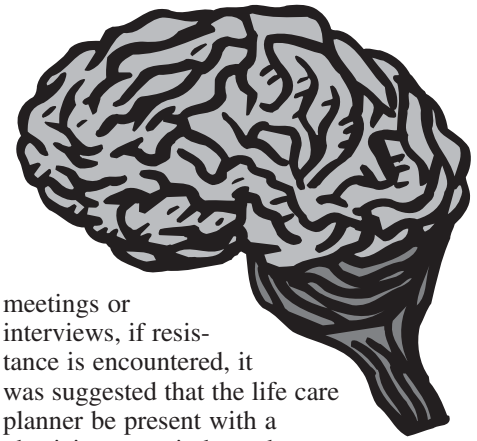
Summary of SDDL Evening Seminar Series "Using Experts to Evaluate Brain Injury Cases"

by J. Todd Konold, Esq., Farmer & Case

SDDL's most recent quarterly seminar featured a panel of four experts that are typically indispensable in evaluating a plaintiff's damages in a brain injury case. The panel was comprised of neuropsychologist Dean Delis, Ph.D., vocational rehabilitation specialist Robert Hall, Ph.D., life care planner and registered nurse Doreen Casuto, R.N., and economist Brian Bergmark, MBA, CPA/ABV, ASA.

The presentation was based upon a set of facts from a recent brain injury case in which many of the above experts were actually involved. The experts provided insight into their respective areas of expertise related to the given set of facts. Provided to those present was a booklet of information containing sample discovery helps that might be relevant in such a case, including C.C.P. Section 2031 requests for the plaintiff's employment records, sample questions to be asked at depositions of various experts, and a checklist for factors to consider in computing the plaintiff's future medical care. A brief question and answer session moderated by SDDL board members John Farmer and Michelle Van Dyke were included in the presentation.

Mr. Bergmark began with a PowerPoint presentation providing analytic touchstones to consider beginning with the analytic and evaluative, and focusing these toward an ultimate economic analysis. Dr. Delis demonstrated the types of testing typically employed by neuropsychiologists and pointed out indicators that can determine whether a plaintiff alleging a brain injury might be fabricating or exaggerating the alleged injuries; a plaintiff that has really suffered a brain injury can surprisingly maintain a sharp short-term memory. Dr. Hall gave examples of specific questions to ask a plaintiff's vocational rehabilitation expert regarding his or her analysis of the plaintiff's condition. Significant in this analysis often includes a review of the plaintiff's elementary school records, as those may demonstrate consistent results of standardized testing which can then be compared to post-accident test results. Ms. Casuto provided insight into specific care frequently considered for a person that has suffered a brain injury. She indicated that it is very important to have the life care planner meet, or at minimum, observe the plaintiff. Although most experienced plaintiff attorneys typically permit such



meetings or interviews, if resistance is encountered, it was suggested that the life care planner be present with a physician at an independent medical examination to personally observe the plaintiff. Mr. Bergmark then demonstrated various ways the plaintiff's damages are calculated, considering a claim for lost future earnings and/or lost earning capacity. It is important that the economist have all available information from the other retained experts so as to make an accurate estimate of the plaintiff's total damages.

The information discussed provided valuable insight into effective methods of providing a competent defense in a brain injury case. The participation of the panel experts was very beneficial and greatly appreciated.

THE BOTTOM LINE

Case Title: Gabino Sanchez, et al. v. San Diego Transit, et al.

Case No.: GIC 783942

Judge: Hon. Ronald L. Styn

Plaintiff Counsel: Saul Reiss, Esq. (Trial counsel) and Rita Nalio, Esq. (Plaintiffs' Attorney throughout litigation - second chair) Plaintiffs: Melissa Elizabeth Aviles, a minor by and through her guardian ad litem Catarina Aviles and Ashley Samantha Aviles, a minor

Defense Counsel: Roger P. Bingham, Esq. of Butz, Dunn, DeSantis & Bingham for Defendants San Diego Transit Corporation and Ardell Finley, Jr. and Robert Scherk, Esq. of Murchison & Cumming for Defendants Leong Kuba Sea Products, Inc. and Javier Rubalcava Martinez

Type of Incident: Wrongful Death action filed as a result of a motor vehicle accident involving a San Diego Transit Bus, Leong Kuba Sea Products Fish Truck and Ford Escort on I-5

Settlement Demand: None

Settlement Offer: None

Trial Type: Jury

Trial Length: 7 days

Verdict: Defense Verdict

Case Title: Julia Sherman and Ted Sherman v. Juliet Fliegel, M.D.

Case No: GIC 786597

Trial Judge: Hon. Fredrick Link

Nature of Case: Medical Malpractice

Plaintiff Counsel: Patrick Berry, Esq. of Barry & Harris

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

Type of Incident: Seizure and cardiac arrest following regional block with anoxic brain injury.

Demand at Trial: Special Damages: $200,000 - $450,000; General Damages: "Mid Six Figures" No exact request made; Loss of Consortium: No specified amount requested

Offers: None

Trial Length: 7 days

Verdict: Defense 12-0

A Lawyer's Guide to Cross-Cultural Depositions

by Nina Ivanichvili

This article will be presented in two parts. The second part will be published in the December, 2003 issue of THE UPDATE. A version of this article was originally published in The Colorado Lawyer Vol. 32, No. 7, July 2003, pp. 81-86.

This article discusses the use of professional interpreters in cross-cultural depositions, and provides tips for depositions involving non-English-speaking deponents.

Part I

The skillful interpretation of languages is both a craft and an art. In the 1964 Cold War drama, Fail-Safe*, Henry Fonda plays a U.S. President who must avoid all-out nuclear war by convincing the Soviet Premier that U.S. bombers had been mistakenly sent to attack Moscow with nuclear weapons. By his side at the hotline is his Russian interpreter, a young Larry Hagman. As Fonda prepares to make the call, he briefs his interpreter:*

Sometimes, there's more in a man's voice than in his words. There are words in one language that don't carry the same weight in another. . . . So, I want to know not only what he's saying, but what you think he's feeling—any inflection in his voice, any tone, any emotion that adds to his words—I want you to let me know.[1]

Attorneys sometimes trade gloomy stories of testimony by foreign-born witnesses. A common complaint is that following a long verbal exchange between the witness and the interpreter, the interpreter turns toward the attorney and solemnly declares, "The witness said, 'Yes.'"

Today, almost one in five Americans speaks a language other than English at home.[2] Therefore, it is no surprise that many non-English-speaking witnesses appear daily in depositions nationwide. At times, many attorneys may yearn for a high-caliber interpreter, like the one played by Larry Hagman in Fail-Safe*, to help them navigate through the esoteric cross-cultural terrain.*

This article addresses ways of overcoming some challenges of a cross-cultural deposition. For purposes of this article, a cross-cultural deposition is one in which the attorney is English-speaking (generally American-born), and the deponent is foreign-born and speaks limited or no English. In other words, a cross-cultural deposition is one in which the attorney and the deponent do not share the same cultural archetypes and common linguistic patterns.

Understand Court Interpreter's Role

There are two categories of language experts. Although the terms "translator" and "interpreter" often are used interchangeably in English, there is a clear distinction between them, as they refer to members of two different professions. Translators deal with the translation of written materials. Interpreters translate orally from one language to another.

Interpretation and translation are complex processes that require in-depth knowledge of two languages and two cultures, as well as familiarity with specific vocabulary. Interpretation and translation are acquired skills of expressing and transferring ideas, formulated within the framework of a particular culture, in another language. These skills may be developed and honed over years of extensive training and practice.

There are relatively few formal guidelines governing interpreters. The Court Interpreters Act of 1978 and the subsequent 1988 amendments mandated that a national certification exam be developed for certifying interpreters qualified to interpret in federal courts.[3] Currently, federal certification programs exist in only three languages: Spanish, Navajo, and Haitian-Creole.[4] The Administrative Office of the U.S. Courts classifies three categories of interpreters: (1) "certified" interpreters, who have passed the Administrative Office certification examination (Spanish, Navajo, or Haitian-Creole only); (2) "professionally qualified" interpreters for languages other than Spanish, Haitian-Creole, and Navajo;[5] and (3) "language skilled" interpreters.[6]

The National Center for State Courts has established a consortium of states to develop court interpreter proficiency tests. Currently, twenty-nine states are members of the consortium for state interpreters.[7]

A court interpreter's role is to "translate exactly what is said and at the same level of discourse the speaker uses."[8] An interpreter in a deposition should not summarize, paraphrase, explain, or verbalize his or her personal opinions. Instead, the interpreter is charged with the task of relating exactly how something is said by counsel and by the non-English-speaking deponent to properly convey the style and form of the message.

Avoid Interpretation by Interested Persons

Untrained, non-professional interpreters often misunderstand the fact that the interpreter is required to be neutral when interpreting in a legal setting. As a result, they may side with a deponent and translate what the interpreter believes to be favorable rather than what is accurate.[9] Interpreters who personally know the defendant or have some interest in the case may have a serious problem in accurately rendering a deponent's testimony, which defeats the purpose of the interpreter in a deposition.

There often are clear signs at the beginning of a deposition that an interpreter is incompetent or noncompliant with the Interpreter's Code. Untrained interpreters commonly fail to use the same grammatical tense as the deponent for whom they are interpreting. For instance, if the deponent says, "I do not recall," the interpreter should repeat, "I do not recall," rather than, "He said he does not recall."

To ensure an accurate record, it is equally important for the deposing attorney to address the deponent directly. If appropriate, the attorney should maintain eye contact with the deponent, as if the interpreter were not present. For instance, counsel should ask the deponent through the interpreter, "Where were you born?" Counsel should not say to the interpreter, "Ask him where he was born."

In the author's experience, immigrants residing in close-knit ethnic communities may know most people in their community. This can make it difficult to find an interpreter who is not a friend or relative of the deponent. It is in the deposing attorney's interest to make sure the interpreter is screened for possible conflicts of interest.

When in doubt regarding the professionalism of an interpreter retained for a deposition by the opposing counsel, an attorney may consider hiring an impartial and qualified "check interpreter." To ensure an accurate record, the check interpreter will speak up only if the main interpreter fails to provide an accurate interpretation of a given statement.

Use Interpreter if English is Limited

When deponents speak some English, but are not fluent, it is not advisable to have them testify in English. Some attorneys are tempted to have an interpreter present, but to let deponents with limited English testify in English when they understand the question and then use the interpreter only when the deponents do not understand what is being asked.

On the whole, it is better to have an interpreter deliver all questions to such deponents and to have deponents provide all answers in their native tongue. Deponents with limited knowledge of the language can become confused if they are not certain of the meaning of questions. The deponents might start guessing or mixing English words with foreign words during the testimony, which would make it difficult for the court reporter to produce an accurate record.

Plan Ahead for Specialty Area Interpreter

In addition to being linguists, some trans-lators and interpreters are professionally qualified in various disciplines such as aerospace, biochemistry, computer science, electrical engineering, electronics, finance, law, mechanical engineering, medicine, pharmaceuticals, physics, and telecommunications. In a complex civil case involving technical specialty areas, the lawyer who will be taking the deposition may want to select an interpreter with expertise in the relevant discipline.

Sometimes, translation companies may have such experts available locally. In other cases, an expert interpreter may have to be brought in from another state. Thus, if the case involves a specialty area, it is advisable to start looking for an interpreter well in advance of the deposition.

Continued on page 14

THE BOTTOM LINE

Case Title: Dubon v. Higgs
Case No: GIC792561
Judge: Hon. Thomas O. Lavoy
Plaintiff's Counsel: Tomas Shpall, Esq. of Rosenberg, Shpall & Associates
Defense Counsel: Pete Doody, Esq. of Higgs, Fletcher & Mack
Type of Incident: Unlicensed painter, falls from ladder and fractures ankle. Homeowner defendant presumed employer and presumed negligent pursuant to labor code 2750.5.
Settlement Demand: $82,000
Settlement Offer: $15,000
Trial Type: Jury
Trial Length: 3 days
Verdict: Defense

Case Title: Susan Burkart v. Gita Sakaria-Englert, D.D.S., and Jon Englert, D.D.S.
Case No.: GIN017585
Judge: Hon. Lisa Guy-Schall
Plaintiff Counsel: Suzanne Mindlin, Esq. and Kenneth Simpkins, Esq.
Defense Counsel: Robert W. Harrison, Esq. of Neil, Dymott, Perkins, Brown & Frank
Type of Incident: Plaintiff claims that Dr. Gita Sarkaria-Englert, D.D.S., and Dr. Jon Englert, D.D.S. negligently removed teeth she wanted saved and fitted her with a negligently made denture.
Settlement Demand: $64,999
Settlement Offer: Waiver of costs
Trial Type: Civil Jury Trial
Trial Length: 8 days
Verdict: Defense

Case Title: Barbara Edelson v. Gary Greenberg, D.D.S.
Case No.: GIC785935
Judge: Hon. Jay Bloom
Plaintiff Counsel: Michael Frank, Esq. of Sussman & Schwartz
Defense Counsel: Robert W. Harrison, Esq. of Neil, Dymott, Perkins, Brown & Frank
Type of Incident: Plaintiff claimed negligent dental care and treatment by Gary Greenberg, D.D.S.
Settlement Demand: Initial demand: $35,000,000 reduced to $249,000 prior to trial
Settlement Offer: None
Trial Type: Civil Jury Trial
Trial Length: 8 days
Verdict: Defense

Member News

Sheila Trexler, a shareholder with **Neil, Dymott, Perkins, Brown & Frank** has been named one of the "Top 50 Women Litigators in California" by *Daily Journal Extra*, a publication of Daily Journal Corporation. Recipients of the award were selected based on nominations from readers, suggestions from prominent lawyers and research conducted by Daily Journal Corporation on women involved in significant lawsuits. "We are very excited that the legal community has recognized Sheila with this prestigious honor" said **Michael I. Neil**, President and Chairman of the firm. Trexler defends health care providers in medical-malpractice suits and professional-license disputes. She recently obtained a defense verdict on behalf of a gynecologist who had been sued in a $1 million medical malpractice lawsuit.

Contrary to the announcement of his partnership with another local firm, **Thomas W. Byron** has become a partner in the San Diego office of **Wilson, Elser, Moskowitz, Edelman & Dicker**, a large New York-based defense firm. Mr. Byron will continue to represent his core clients in the practice areas of the Defense of Architects and Engineers, Insurance Coverage Analysis and Litigation, and General Civil Litigation Defense.

Fredrickson, Mazeika & Grant is pleased to announce the following associates have joined the firm's San Diego and Las Vegas offices: **John Pearson**, a 2001 graduate of Thomas Jefferson School of Law, is admitted to the California and Nevada Bars. John will practice in the San Diego office and specialize in the areas of personal injury and products liability defense. **Danielle Nelson**, also a Thomas Jefferson graduate, was admitted to the California Bar in 2002 and will focus her practice on construction defect litigation while in the San Diego office. **Melissa Roose** joins the Las Vegas office, specializing in construction defect and personal injury. She is admitted to practice in Nevada, California and Arizona.

Liz Skane has added Shawn Robinson as an associate to her firm, **Law Office of Elizabeth Skane**.

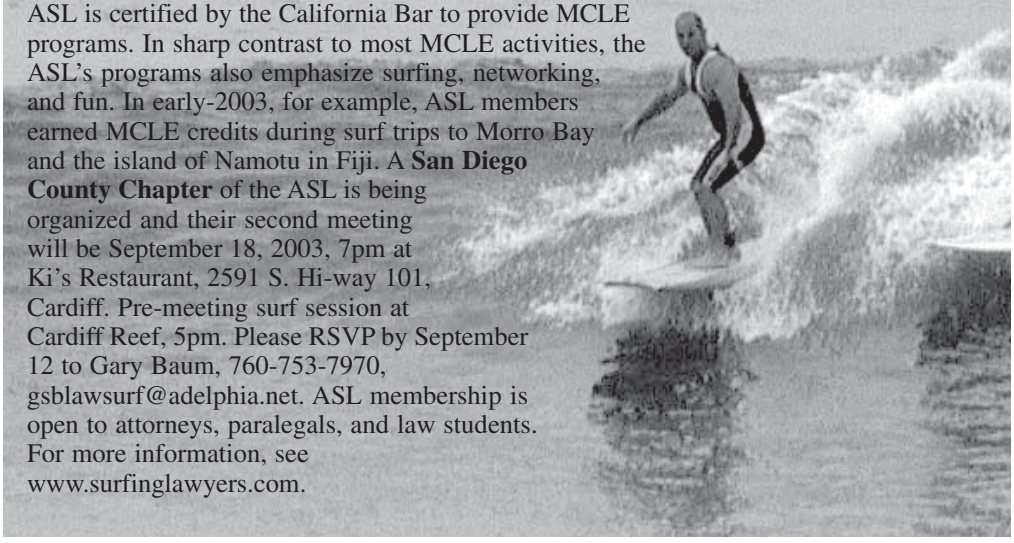
Robert S. Gerber of **Sheppard, Mullin, Richter & Hampton LLP** was appointed as member of the Judicial Nominees Evaluation Commission ("JNE Commission") by the Board of Governors of the State Bar of California. He is the only appointee in private practice from District 9, which covers San Diego County. Criteria for JNE Commission membership consist of a multitude of factors, including but not limited to: length of time in the practice of law or; accomplishments of note; proven commitment to volunteer work or strong indication of capacity and desire for making the expected time commitment; personal recommendations for the appointment; and educational background. Gerber practices within the Intellectual Property and Business Trial Practice Groups at Sheppard Mullin. His practice includes a variety of commercial litigation in both state and federal courts, with special emphasis on intellectual property and technology litigation. As chair of the firm's Pro Bono Committee, Gerber contributes a significant amount of time to pro bono representation of indigent clients through the San Diego Volunteer Lawyer Program. Gerber also received national media recognition for his successful pro bono representation of Geovanni Hernandez-Montiel. In the landmark immigration case, a federal appeals court for the first time established persecution based on sexual identity as grounds for asylum. Gerber's work earned him the Tom Homann Law Association's President's Award for the year 2000. Among many other professional activities, Gerber is an advisor to, and a former Chair of, the Litigation Section of the State Bar of California, the largest voluntary State Bar organization with nearly 10,000 members, and Chair of the San Diego County Bar Association's Legal Ethics Committee.

Pierre F. Smith has joined **Deuprey & Associates, LLP** as an associate. Mr. Smith completed his undergraduate degree in Legal Studies at the University of Massachusetts at Amherst and received additional training in negotiations, civil liberties and international business transactions in Florence, Italy and Paris, France at the Institute on International and Comparative Law. In 2002, he received his Juris Doctorate from the University of San Diego School of Law, where he also earned honors in Lawyer Skills I and the American Jurisprudence award for Torts. While studying at USD, Mr. Smith participated in the Pro Bono Legal Advocates program, which provided mediation and alternative dispute resolution training for his work with the San Diego Mediation Center in Small Claims Court settlements. Mr. Smith will assist Deuprey & Associates, LLP with its representation of physicians in medical malpractice cases and with defense work in business and general liability matters.

Jennifer French has joined **Wayne Thomas & Associates** as an associate. The firm practices in the areas of construction defect, personal injury, and general civil litigation

ASSOCIATION OF SURFING LAWYERS ORGANIZES IN SAN DIEGO

In 2002, Los Angeles attorney David Olan established the Association of Surfing Lawyers in an effort to develop friendship, networking opportunities, and professionalism among lawyers committed to practicing law and surfing. The ASL started out as a few surfing lawyers paddling out for "board" meetings followed by breakfast. The association now boasts over 200 members, including Justice J. Gary Hastings of the California Court of Appeal, Second District Division Four. A 501(c)(6) organization, the ASL is certified by the California Bar to provide MCLE programs. In sharp contrast to most MCLE activities, the ASL's programs also emphasize surfing, networking, and fun. In early-2003, for example, ASL members earned MCLE credits during surf trips to Morro Bay and the island of Namotu in Fiji. A **San Diego County Chapter** of the ASL is being organized and their second meeting will be September 18, 2003, 7pm at Ki's Restaurant, 2591 S. Hi-way 101, Cardiff. Pre-meeting surf session at Cardiff Reef, 5pm. Please RSVP by September 12 to Gary Baum, 760-753-7970, gsblawsurf@adelphia.net. ASL membership is open to attorneys, paralegals, and law students. For more information, see www.surfinglawyers.com.



HOT CASES!!!

Vitton Construction, Inc., et al. v. Pacific Insurance Co.

2003 Daily Journal D.A.R. 8047

by J. Todd Konold, Esq., Farmer & Case

For those engaged in construction defect and injury practice, it should be noted that it was recently held, in the case styled, Vitton Construction, Inc. v. Pacific Insurance Company that a general contractor was entitled to coverage as additional insured under its subcontractor's umbrella policy when minimal causal connection exists between alleged injury of construction worker on job site and subcontractor's scope of work.

Factually, in Vitton, a construction worker fell through an opening in a roof, which opening was constructed by a subcontractor. The subcontractor had completed its work; the general contractor was under the duty to maintain the openings in a safe condition. Reversing the trial court's ruling, the First District Court of Appeal ruled that the general contractor was entitled to coverage as an additional insured under the subcontractor's umbrella policy because the policy permitted coverage to additional insureds if the alleged loss arose out of subcontractor's work. No limitation of coverage requiring evidence of subcontractor's liability was included in the policy.

The Court further declared in dicta that if the umbrella policy had included language requiring a link between the subcontractor's negligence and the accident, then additional facts would have to be considered as to whether the accident is attributable to the named insured's negligence, and if so, whether insurance coverage would be available to the additional insured. Insurers are free to include such limiting language in the policies they issue. However, in the policy at issue, the language providing coverage to additional insureds was very broad, and did not require a showing of negligence on the part of the subcontractor; thus, the threshold of a "causal link" between the accident and subcontractor's scope of work was very low.

Hamilton v. Matinelli & Associates

2003 Daily Journal D.A.R. 8199

by Gina C. Haggerty, Esq., Farmer & Case

In Hamilton v. Martinelli & Associates, 2003 Daily Journal D.A.R 8199, the Court found that the doctrine of primary assumption of risk bars employee's tort claims for injury caused by participation in training course.

Plaintiff was employed as a probation correction officer and peace officer with San Bernardino County. As a condition of employment she was required to participate in an "Unarmed Defensive Tactics" training course. Defendant instructed the course. During the training course, Plaintiff suffered injuries to her neck and back while performing a training maneuver. As a result of her injuries, she was no longer able to work as an officer. The trial court granted Defendant's summary judgment motion on Plaintiff's complaint for personal injuries based on negligence and intentional tort and Plaintiff appealed.

The trial court concluded and the Appellate Court affirmed that the doctrine of primary assumption of risk barred Plaintiff's negligence and intentional tort claims, and that Civil Code section 1714.9, which sets forth specific exceptions for firefighter's rule, did not apply. The Court reasoned that the undisputed facts establish that Defendant performed a training maneuver on Plaintiff, and not an attack. Thus, the burden shifts to Plaintiff to show that the maneuver was so violent or dangerous as to be outside the category of the training exercise. Plaintiff failed to show that Defendant exceeded the boundaries of the normal risks associated with this type of training.

In discussion, the Appellate Court noted that the doctrine of primary assumption of risk applies in the employment context. Herrle v. Estate of Marshall (1996) 45 Cal.App.4th 1761. In fact, it has been held that the doctrine of primary assumption of risk applies where the defendant is impliedly relieved of any duty of care by plaintiff's acceptance of employment involving a risk of known danger. Farnam v. State of California (2000) 84 Cal.App.4th 1448. In the instant case, Plaintiff's neck and back injuries were an inherent risk of performing the training maneuver. Moreover, Plaintiff's employment duties entailed the very risk of injury of which she complains.

The Appellate Court concluded that Plaintiff assumed the risk of her injuries by participating in the training course. Plaintiff's public employment duties included restraining some violent juvenile offenders. Her training in the use of unarmed defensive tactics enabled her to perform these employment duties. The Appellate Court found no triable issue of material fact that Defendant increased the risk of harm to Plaintiff in performing the training maneuver, or intentionally caused Plaintiff's injuries.

Marie Y. v. General Star Indemnity Co.

2003 Daily Journal D.A.R. 8132

by Susan I Filipovic, Esq, Farmer & Case

In Marie Y. v. General Star Indemnity Co., 2003 Daily Journal D.A.R. 8132, plaintiff brought an underlying action for damages against her dentist David Phipps for sexual misconduct and related claims. She went to Phipps's office for dental treatment on April 5, 1994. He administered nitrous oxide to her. It made her extremely relaxed, with her muscles and eyelids heavy; during the two-hour session, her eyes were closed and she did not speak.

During the procedure, Marie Y. felt Phipps's hand go underneath the dental bib to give her breast a sudden squeeze or

caress, putting his hand completely over it; he squeezed her right breast three times and her left breast once. She did not consent to these touchings and considered them inappropriate. Phipps then put his hand under Marie Y.'s shorts and slid it four inches up her right thigh to the panty line. He also put his hand on top of hers as it rested above her pubic area.

Phipps was covered by a professional liability policy issued by General Star Indemnity Company. General Star refused to defend or indemnify Phipps in the action brought by Marie Y. Phipps then assigned his rights against General Star to Marie Y., who brought the subject action and was awarded the amount of $1,415,639.54. General Star appealed.

The Court concluded that General Star never had a duty to indemnify Phipps, and, that indemnification was barred by Insurance Code section 533, excluding coverage for wilful acts. However, the Court did note that General Star breached its duty to defend Phipps. The Court relied on Ohio Casualty Ins. Co. v. Hubbard (1984) 162 Cal.App.3d 939, that "if the reasonable expectations of an insured are that a defense will be provided for a claim, then the insurer cannot escape that obligation merely because public policy precludes it from indemnifying that claim." Ohio Casualty Ins. Co. v. Hubbard, 162 Cal. App. 3d at 947. The judgment was reversed and remanded to the trial court to award Marie Y. damages only for the amount of reasonable attorney's fees and costs incurred by Phipps in defending Marie Y.'s action.

Low v. Golden Eagle Insurance Company, et al.

2003 Daily Journal D.A.R. 8657

by Kristin A. Butler, Esq., Farmer & Case

In Low, the Court of Appeal held a carrier was not responsible for expenses the insureds incurred in resolving a third party action brought against them for construction defects.

A commercial general liability policy was issued to general contractor Armato Development, Inc. (ADI) by Golden Eagle for the policy period during which the home involved in the underlying construction defect suit was built. Leonard Armato and Liz Stewart Development & Design, Inc. were the successors-in-interest to ADI, standing in its shoes as insures as respects Golden Eagle. Conditions of the policy were that notice of any law suits was to be provided to Golden Eagle as soon as possible, cooperation by the insured, and no payments or obligations were to be made other than first aid without the consent of Golden Eagle.

The insureds were sued for alleged construction defects in a single family home, on September 3, 1996. A tender of defense was not made to Golden Eagle until October 21, 1998. In the meantime, Mr. Armato funded the defense for all defendants. Between October 21, 1998 and November 30, 1998, several letters were exchanged between counsel for the insureds and Golden Eagle. During that time, Golden Eagle accepted the defense under a reservation of rights as to ADI. However, it continued investigating its duty to defend Liz Stewart Development, and requested documents. These documents were not provided at that time.

On January 25, 1999, the parties in the defect action settled. Golden Eagle was not informed of or consulted regarding the possibility of settlement. On February 23, 1999, the insureds produced the requested documents. After many letters back and forth, Golden Eagle finally denied the request for reimbursement of settlement and expenses on June 5, 2000, indicating that notice was not timely provided nor was Golden Eagle consulted before settlement. The trial court determined that the insureds did not have a right to recover pre-tender expenses, but did have a right to reimbursement for post-tender expenses and settlement payments.

The Court of Appeal reversed that portion of the trial court's decision awarding post-render recovery, determining that the insureds breached the condition of the policy which required them not to enter in any obligations or payments without consultation of Golden Eagle. The language of this condition indicated that this is a voluntary payment or obligation. The insureds argued that their settlement of the defect action was not voluntary and was done to protect their interests. The Court noted that one of the exceptions to a policy condition of this nature is where the insured makes an involuntary payment due to circumstances beyond its control not knowing the insurer's identity or policy contents and must act immediately to protect its legal interests. The Court determined that such was not present in this matter for several reasons. First, a third party, Mr. Armato, funded the legal expenses. Second, if the insureds were so desperately in need of help from Golden Eagle, they should have responded to the letters requesting additional information for Golden Eagle's investigation regarding coverage three months before settlement. Third, the settlement itself was not structured in such a way to indicate that the settlement was involuntary. The Court observed that another exception exists when the insurer denies the tender and abandons the insured creating an antecedent breach of their coverage obligations which leaves the insured to fend for itself. This also did not happen in this matter.

Golden Eagle argued that it should be relieved of obligations to fund the post-tender expenses and settlement because of the insureds' breach of the policy provisions. The Court indicated that the insured only can ignore the policy provisions when the carrier has denied a defense. It was an abuse of discretion by the underlying court to obligate Golden Eagle to payment of post-tender expenses and settlement.

The insureds argued that Golden Eagle was estopped by its delay and inaction from rejecting the claim. The Court indicated that finding that there had been a breach of the policy provision that no obligations or payments be made without consultation of Golden Eagle made it implicit that there was no estoppel. It must be shown that the inaction of Golden Eagle alone caused the Claimants to settle for an estoppel to be created. Here, the insureds did not inform Golden Eagle of the settlement negotiations, did not produce the requested documentation regarding coverage, and led Golden Eagle to believe that the trial had been continued.

THE BOTTOM LINE

Case Name: John Erickson, et al. v. R.E.M. Concepts dba ABC Products

Case No.: GIC775707

Judge: Honorable Ronald L. Styn

Plaintiff Counsel: William Naumann, Esq. and Chris Hagan, Esq. of Naumann & Levine, LLP

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

Type of Incident: Construction defect case involving 23 single family homes in the Encore and Bella Collina subdivisions located in Oceanside. The Plaintiffs' action was originally against the two Developers, Brehm and YLR, Inc., and those two Developers cross-complained for express indemnity against R.E.M. Concepts and numerous other subcontractors. The Developers and all other subcontractors reached settlements with the Plaintiffs and as part of the settlement, the Developers assigned their express indemnity rights and contractual attorneys fees rights against R.E.M. Concepts to the Plaintiffs. The Plaintiffs also amended their Complaint to Name R.E.M. Concepts as a direct Defendant.

Settlement Demand: Plaintiffs' settlement demand was $217,500.00. That demand was withdrawn prior to trial

Settlement Offer: R.E.M. Concepts made §998 offers to the Plaintiffs totaling $34,500.00.

Trial Type: Jury

Trial Length: 16 days

Verdict: Defense verdict on all 23 homes. Vote was 12-0 on the strict liability and negligence causes of action on 22 homes and was 10-2 on 1 home

COMMENTS: Pursuant to the §998 offers and the attorneys fees clauses in the subcontracts, R.E.M. Concepts has pending claims for expert fees and attorneys fees in addition to ordinary costs of suit ($70,000.00+).

"The Westerfield Trial"

Brown Bag Program - July 31, 2003

The SDDL Brown Bag Lunch on July 31, 2003 was presented by Jeff Dusek and George "Woody" focusing on evidentiary and witness issues arising out of the *Westerfield* trial. Mr. Clark is a DNA specialist and was called in to assist Mr. Dusek because of the large quantity of DNA evidence involved in this matter. Mr. Clark's rise to fame came from his involvement in the *O.J. Simpson* trial.

One of the areas discussed was the involvement of the media in high publicity trial such as this. Mr. Dusek was concerned about the possibility of the jury pool being tainted and to what degree. To his great surprise, not all residents of San Diego County were glued to the television watching every moment of the *Westerfield case* unfold. When matters were reported which were unfavorable to the prosecution or inaccurate, Mr. Dusek's hands were tied. There was a gag order. As such, he had little opportunity to do damage control, and was forced to grin and bear it, so to speak.

Another issue discussed by the panelists was how to deal with a witness with a less than angelic past. In order to soften the blow of the sex parties and drug use, Mr. Dusek brought it out on direct and let Mrs. Van Dam explain it. Then, he ended her testimony discussing Danielle, and the things she would miss in life. By doing this, Mr. Dusek made it difficult for the defense to attack Mrs. Van Dam because of how it would make them look in the eyes of the jury.

During some of the testimony regarding bugs and their life span, Mr. Clark realized that the defense expert did not understand the difference between median and mean. This was a key factor because all of the bug testimony revolved around the mean and median of some of the data. Mr. Dusek admitted that he too did not understand the difference. However, once the opportunity to highlight the fact that the witness himself did not know what he was talking about arose, Mr. Dusek took it, even though he was sailing into uncharted waters.

Some of these issues and the lessons to be learned from them are applicable to both civil and criminal matters. It was very interesting to hear local celebrities talk so candidly about the potential problems in this tragic but meaningful case.

"LiveNote: Demo and Instruction"

Brown Bag Program - August 21, 2003

The SDDL brown bag lunch seminar on August 21, 2003, featuring Brenda Peterson of Peterson Court Reporting, provided useful instruction and demonstrations involving the use of LiveNote at depositions. Ms. Peterson has been providing court reporting services for over twenty years, and has owned her own court reporting firm for 18 years.

The cost of the LiveNote software is approximately $690. If LiveNote is used at a deposition, the San Diego standard fee for the service is $1 per page. Effective September 1, 2003, there will be a $35 charge per day for a LiveNote connection, due to copyright issues.

Some of the basic functions of the program are rather simple. To temporarily stop the text from scrolling across the screen, simply hit the ESC key. To highlight a portion of the text which you find important, simply hit the space bar. Annotations can be prepared in advance that sit along the top of the screen. Potential annotation subjects could be liability, causation, or damages. These are assigned colors and letters. When you strike that letter, the color which has been designated for that annotation appears as a highlight on the relevant text.

The software provides you the opportunity to make notes and reports based upon the text. In addition, other members of your firm can make additional notes and reports. When this is done, the software makes notations in the work product indicating who created it and when.

At a deposition, if internet access is available, a live internet feed is possible. This provides the opportunity to have instant messenger contact with anyone through the program. For example, if a subject arose in the deposition which you would like your expert to view before the deposition ends, you can send him/her an instant message with that portion of the deposition. Then, the expert can respond with any comments or questions via the instant messenger portion of the program.

LiveNote can be used to synch with depositions that are videotaped. Exhibits can be linked to the transcripts, as well. It is recommended that your laptop have a Pentium IV processor. Also, you will need a serial port to connect to the court reporter.

Peterson Reporting has some new services available via their website, www.bookadepo.com. A password will be provided, and deposition transcripts can be viewed online in the repository. Also, this website has a calendar permitting a view of all depositions on calendar for your firm. Invoices can be viewed, as well. Lastly, your secretary or assistant can book depositions through the website.

THE BOTTOM LINE

Case Title: Damian Mendivil v. Sanford Ratner, D.D.S.
Case No.: OCSC 02CC02481
Judge: Hon. Robert Moss
Plaintiff Counsel: Marcus Petoyan, Esq. of Sherman Salkow Petoyan & Weber
Defense Counsel: Robert W. Harrison, Esq. of Neil, Dymott, Perkins, Brown & Frank
Type of Incident: Failure to inform plaintiff of pregnancy prior to surgery for TMJ.
Settlement Demand: $135,000
Settlement Offer: Waiver of costs
Trial Type: Civil bench trial
Trial Length: 2 days
Verdict: Defense

Case Title: Robbie Lori Heisler v. Robert deRose
Case No.: GIC 782485
Judge: Hon. Janis Sammartino
Nature of case: Auto vs. Pedestrian
Plaintiff's Counsel: Dan Zeidman, Esq.
Defense Counsel, John T. Farmer, Esq. of Farmer & Case
Type of incident: Plaintiff claims she was holding a parking spot for a friend in Del Mar when she was struck twice by a Porsche driven by defendant, resulting in two knee surgeries including ACL reconstruction.
Demand: $280,000.00, reduced to $125,000.00, CCP Sec. 998
Offer: $25,000.00, raised to $50,000.00, CCP Sec. 998
Trial Type: Jury
Trial Length: 6 days
Verdict: Defense

Case Title: Marvel Funk v. Dean Saiki, D.D.S.
Case No.: GIN 023050
Judge: Hon. Thomas P. Nugent
Plaintiff Counsel: J. Michael Vallee, Esq. of Law offices of J. Michael Vallee
Defense Counsel: Robert W. Harrison, Esq. of Neil, Dymott, Perkins, Brown & Frank
Type of Incident: Plaintiff suffered an allergic reaction after taking antibiotic medication.
Settlement Demand: $19,999
Settlement Offer: Waiver of costs
Trial Type: Civil Jury Trial
Trial Length: 3 days
Verdict: Defense

Lawyers Needed to Judge 2003 SDDL Mock Trial Competition

Save the evenings of **Thursday October 16th and Friday October 17th** on your calendars! Law students from schools throughout California, and even teams from as far away as New York, will be competing in the 13th Annual SDDL Mock Trial Competition. Attorneys and retired Judges are needed to serve on three judge panels at the downtown Superior Court. The Mock Trial will be a civil case with brief testimony from live witnesses. The law students are typically the finest advocates from their schools, and many perform at a remarkably high level in the courtroom. This tournament is very important to the students, and it provides an opportunity for established lawyers to help teach the art of courtroom advocacy. Having volunteer judges is essential to the continued success of this program. If you can serve on a three judge panel either of these two nights please call or fax Sandee Rugg of SDDL at 858-546-5254 voice or 858-535-4001. If you have any questions about the tournament, please call SDDL Board Member Christopher Welsh at (619) 645-3157.







THE BOTTOM LINE

Case Title: Penny Peukert v. Ronald Roncone, D.D.S. and Christopher Roncone, D.D.S.

Case No.: GIN 0188040

Judge: Hon. Dana Sabraw

Plaintiff Counsel: John Dumbeck, Esq. of Dumbeck & Dumbeck

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

Type of Incident: Plaintiff claims that defendants provided negligent treatment of her tempromandibular joint disorder

Settlement Demand: $74,999

Settlement Offer: Waiver of Costs

Trial Type: Civil Jury Trial

Trial Length: 4 days

Verdict: Defense

Case Title: Robinson vs. Vecchione, M.D., et. al.

Case No.: GIC 791231

Trial Judge: Hon. Vincent P. DiFiglia

Nature of Case: Medical Malpractice

Plaintiff Counsel: Philip L. Asiano, Esq. of Law Office of Philip L. Asiano, P.C.

Defense Counsel: Hugh A. McCabe, Esq. of Neil, Dymott, Perkins, Brown & Frank

Type of Incident: Discovery of glass retained in buttocks one year after examination and treatment by both physician and surgeon

Demand at Trial: $ 130,000

Settlement Offer: none

Trial Type: Jury

Trial Length: 5 days

Verdict: Defense

A Lawyer's Guide to Cross-Cultural Depositions

Continued from page 5

Scheduling is only one aspect of careful deposition planning. To allow the interpreter to prepare properly, counsel should provide him or her with a copy of the complaint and other key pleadings, documents, or exhibits. By way of example, in a patent case, counsel should provide the interpreter with copies of the patents in controversy. In a product liability case, if the product catalog will be an exhibit, counsel should give a copy to the interpreter.

Determine Deponent's Language and Dialect

Counsel should determine the language or dialect the deponent speaks. In selecting an interpreter, it may be necessary to take into account the deponent's national origin. For example, Arabic interpreters sometimes are automatically called to interpret for deponents from anywhere in the Arab world.

A professional interpreter may be fluent in a foreign language without knowing all of the dialectal differences within the language. For instance, it is not enough to request a "Chinese" interpreter. There are eight dialects in China, and one Chinese dialect may be practically unintelligible to someone who speaks another dialect. Mandarin is spoken in northern China (Beijing), Taiwan, and Singapore; Cantonese is used in Southern China and Hong Kong and is spoken by many Chinese immigrants to the United States. Knowing in advance the language or dialect in which the deponent is fluent before hiring an interpreter can prevent confusion and delays.

Understand Deponent's Background

Cultural archetypes, or the "deep-seated collective attitudes and values formed by a culture,"[10] are the "eyeglasses" through which people look at the world. People evaluate, assign priorities, judge, and behave based on how they see life through those lenses.[11] Culture influences the communication process in significant ways, such as the selection of language, thinking patterns, interpretation of verbal and non-verbal cues, the role of silence in face-to-face interaction, perception of time and personal space, and concepts of respect and politeness.

Before the deposition, the attorney might want to learn more about the deponent's culture to gain an understanding of the potential communication issues that may arise. Nonetheless, it is important to avoid stereotyping; beliefs about the deponent's background and expectations about the testimony may prove to be inaccurate. For example, a deponent could be influenced by such factors as: (1) how long the deponent has resided in the United States; (2) the deponent's familiarity and comfort level with the Western cultures; and (3) the level of the deponent's education and professional status.

On the other hand, even though the individual's background is not necessarily indicative of anything, it may provide a glimpse into his or her psychological mind-set. Consider the following hypothetical. An older Russian male is asked to recall the date of an automobile accident in which he was involved four years earlier. He states that he cannot recall that date. When the deposing attorney gives him the date on which the accident allegedly occurred, the Russian-speaking witness immediately agrees. When asked how he suddenly remembers what he could not recall a minute ago, he replies, "Because you have just told me that your paper says so." The deponent has resorted to a familiar behavioral pattern of unquestioningly submitting to authority—in this instance, represented by the American attorney.

To understand this behavior, the attorney needs to remember that Russia only recently emerged from a culture dominated by a totalitarian political system. In that environment, the predominant motivation for behavior was fear and avoidance of retribution by representatives of the totalitarian regime. This mindset still might be deeply rooted in the psyche of the ex-Soviets of the older generation. In the above example, where the attorney provided the date of the accident, the witness potentially compromised his credibility by bowing to authority.

Be Aware of Culture-Specific Mannerisms

Attorneys should be mindful that cultural differences can affect nonverbal communication. Behavioral patterns of a deponent from a foreign country may appear suspect to a native-born American attorney if they do not fall within the common cultural experience of that attorney. In American culture, looking someone straight in the eye is a statement of open and honest communication. In some other cultures, looking a person in the eye is a sign of disrespect. In the author's view, that explains why some Asian deponents would rather stare at the table instead of looking at the deposing attorney, even when they have nothing to hide.

Gender also may play a role. The author has been advised that sometimes, when a witness from the Middle East is deposed by an American attorney of the opposite gender, he or she is likely to avoid eye contact with the deposing attorney. This is not because the deponent has something to hide; the action is based on an understanding of the cultural dynamics of male-female communication and is a sign of polite respect or modesty. That deponent is more likely to look a deposing attorney straight in the eye when the attorney is of the same gender as the deponent. As mentioned earlier, a number of variables, including the length of residence and level of assimilation in the United States, may further influence such a deponent's conduct at the deposition.

People learn to express emotions based on their cultural archetypes and in ways that may be unfamiliar to outsiders. For example, some Asian cultures use a smile as a mask when dealing with unpleasant situations.[12] Thus, an Indonesian-speaking deponent from a rural area might smile when discussing sad or upsetting matters. In Indonesian culture, "smiles do not necessarily imply delight, amusement, friendliness." Indonesians "unconsciously and effortlessly smile as they meet people, speak with others, or encounter experiences that are neither funny, nor delightful."[13]

People from Mediterranean cultures and Eastern European Jews, on the other hand, often tend to be very facially expressive and use frequent gestures.[14] Before any attempt is made at interpreting deponents' body language, the deposing attorney may want to observe their personal style and "baseline" body language in a context of a non-stressful conversation.[15]

Respect the Deponent's Ethnic Identity

Attorneys sometimes are careless and confuse the country of origin, native language, or ethnic identity of the deponent. For instance, perestroika put an end to several decades of forceful "russification" of areas with predominantly non-Russian populations. Having become independent states, the former Soviet republics elevated their national languages to the status of official languages. Several former Soviet republics, such as the Republic of Moldova and the Republic of Uzbekistan, even rejected the Cyrillic alphabet and Latinized their writing. To avoid alienating deponents from countries such as Lithuania, Armenia, or Tajikistan, deposing attorneys should not refer to them as "Russians."

By the same token, all the Spanish-speaking countries today are independent states. Therefore, it likely will be puzzling —if not offensive—for a Spanish-speaking deponent from Costa Rica or Uruguay to be referred to as Mexican.

About The Author:

Nina Ivanichvili is CEO of All Language Alliance, Inc., a Colorado-based translation company specializing in legal, technical, financial, and medical translations in over 80 languages. She is also an English-Russian court interpreter and an English-Russian translator, accredited by the American Translators Association—(303) 470-9555; translate@languagealliance.com; website: http://www.languagealliance.com. *Attorneys in California can get credit for taking this online CLE course. See the details at http://languagealliance.com/white-paper.*

The conclusion (Part II) of this article will be in the December 2003 issue of THE UPDATE

FOOTNOTES

1. Fail-Safe (1964).
2. Frey, "Multilingual America," 24 American Demographics 20 (July/Aug. 2002).
3. 18 U.S.C. §§ 1827-28.
4. See http://www.uscourts.gov/interpretprog/infosheet.html.
5. To be "professionally qualified," the interpreter must: (1) have previous employment as a conference or seminar interpreter with a U.S. agency, the United Nations, or a similar entity if a condition of employment includes successfully passing an interpreter examination; or (2) be a member in good standing in a professional interpreter association that requires a minimum of fifty hours of conference interpreting experience in the language of expertise, and sponsorship of three qualified members of the same association. For a full description of the requirements, see Federal Court Interpreter Information Sheet, available at http://www.us courts.gov/interpretprog/infosheet.html.
6. "Language skilled" interpreters must be able to "demonstrate to the satisfaction of the court their ability to effectively interpret from the foreign language into English and vice versa in court proceedings." Federal Court Interpreter Information Sheet, supra, note 5.
7. See http://www.ncsconline.org/wc/publications/Res_CtInte_ConsortMemberStatesPub.pdf. See also "Court Interpretation Resource Guide: Knowledge and Information Services," available at http://www.ncsconline.org/WC/Pub lications/Res_CtInte_ModelGuidePub.pdf.
8. Rainof, "How to Best Use an Interpreter in Court," 55 Cal.St.B.J. 196, 198 (1980).
9. Committee on the Legal Needs of the Poor, "Equal Justice and the Non-English Speaking Litigant: A Call for Adequate Interpretation Services in the New York State Courts," reprinted in 49 Record of the Assoc. of the Bar of the City of New York 306, 312 (April 1994).
10. Rapaille, 7 Secrets of Marketing in a Multi-Cultural World (Provo, UT: Executive Excellence Pub., 2001) at 20.
11. Id.
12. Mogil, "I Know What You're Really Thinking": Reading Body Language Like a Trial Lawyer (Bloomington, IN: 1stBooks, 2003) at 63.
13. Heryanto, "Politically incorrect smiles: Bali incident," JAKARTA POST (Nov. 25, 2002); database: Business Source Premier.
14. Mogil, supra, note 12 at 8.
15. Id. at 9.

Membership Information

Membership is open to any attorney who is primarily engaged in the defense of civil litigants. Membership dues are: $ 90 for attorneys in practice less than one year and $120 for attorneys in practice more than one year. Applications are available on the web at www.sddl.org.

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