

## "Toxic" Mold Litigation A Multi-Disciplinary/Proactive Approach

by Brian J. Clark and Deborah A. Little

Multimillion dollar verdicts in lawsuits that allege injury caused by mold infestation have thrust mold into the national spotlight. Making headlines was *Ballard v. Fire Insurance Co.*, No. 99-05252 (Tex. Dist. Ct., 250th Dist., Travis County, June 1, 2001), where a family was awarded \$32 million against their insurer for bad faith. Although the Texas Court of Appeals reduced that verdict to roughly \$4 million in *Allison v. Fire Insurance Co.*, 98 S.W.3d 227 (2002), the family is appealing the decision to the Supreme Court of Texas. However, the final outcome of the suit is irrelevant because the original verdict has already sent its message: mold litigation can equal big money for plaintiffs and their lawyers.

The largest personal injury verdict to a single family is believed to be that of *Mazza v. Schurtz*, No. 00ASo4795 (Superior Ct., Sacramento County, California, Nov. 7, 2001)—\$2.7 million. In *Mazza*, the plaintiff alleged that the defendant property owners failed to properly maintain and repair the subject property, resulting in water intrusion and the development of toxic molds. Plaintiff's contention was that this mold infestation caused them to sustain significant injuries to their immune, cellular, and respiratory systems, with symptoms including joint pain, fatigue, and chronic upper respiratory infections.

In addition to these large monetary awards, mold has also garnered media attention because of its high profile plaintiffs. For instance, legal crusader Erin Brockovich (played by Julia Roberts in the movie that bore her name) alleged that she and her family got seriously ill from mold growing in the house that she purchased with her movie royalties; she settled with the home builder for an undisclosed amount, and a lawsuit against the seller is pending in California. Johnny Carson's former *Tonight Show* sidekick, Ed McMahon, fell ill, and his dog died, allegedly from toxic mold growing in his Beverly Hills mansion. He sued his insurance company and contractors who had worked on his house, asserting that the contractors' faulty repair work on a leaky pipe caused the contamination and subsequent spread of mold. In April of 2003, McMahon settled for over \$7 million.

Even more recently, hard rock musician Ted Nugent and his family were allegedly forced

from their Michigan home after a water leak in the house's roof apparently led to mold. The family is considering legal action. Mold cases involving public figures like these have added fuel to the mold litigation fire.

It is important to note that such claims, however, are not limited to homeowners. Mold has now become one of the biggest environmental liability concerns that businesses face. How can lawyers best protect their clients from mold litigation and possible business interruption and relocation due to mold? They should develop an understanding of mold and the multifaceted legal, scientific, and medical issues it involves and work with a multidisciplinary team to proactively focus on the issues.

### What is Mold?

Molds are the most common type of fungi. While most mold is harmless, some claim that exposure to certain "toxic" molds causes illness. To date, only a handful of studies have examined the potential health effects of mold, and scientists disagree about whether these studies have effectively established a causal relationship between mold and illness.

Mold needs both food and water to live. Unfortunately, the cellulose-based products used today to construct buildings make perfect meals for mold, which can exist within walls, insulation, and floor underlayment. Given any source of water, such as a leaky roof or pipe, mold can thrive in virtually any building, in any climate. Molds reproduce through the production of spores which, when released, are carried in the air and can easily be inhaled.

Although mold has been around since at least biblical times (*Leviticus*, 14:33-14:57), it has recently become a greater threat as construction means, methods, and materials have changed. Today's energy-efficient buildings are generally more airtight, and the reduced amount of outside air introduced has been linked to many indoor air quality problems.

### Health Effects

The alleged impacts of mold on the human body are typically categorized as: allergic; infectious; and toxic.

Although some people are allergic to mold, whether toxic or not, their reactions are usually temporary and abate once they are

separated from the mold. Infectious responses to mold are exceptionally rare and typically occur only in individuals with weakened immune systems.

"Toxic mold" refers to certain mold species that allegedly cause a toxic response in humans—*stachybotrys chartarum*, *aspergillus*, *penicillium*, and *cladosporium*. As a by-product of their metabolism, these molds produce poisons known as toxins, which can be inhaled. While the existence of these molds is not debated, their health effects are. Although conclusive proof has not yet been discovered, plaintiffs claim that toxic mold has caused a range of temporary and permanent injuries, including cancer and brain damage.

### Complex Mold Litigation

Occupants of multi-unit office towers are suing building owners and property managers, who are in turn suing architects, engineers, and contractors, and everyone is suing their insurance carrier. Estimates indicate that there are approximately 10,000 mold-related lawsuits pending in the United States, filed in more than 20 different jurisdictions. Virtually anyone who has any connection to a mold-contaminated building is at risk of becoming a defendant. Not only is the expert-intensive litigation itself expensive, but the investigation to determine the cause, type, and extent of the contamination can run in excess of \$1 million, and the cost to remediate can be upwards of \$150/square foot. Additionally, punitive damages will likely be claimed in cases of fraudulent concealment.

*Continued on page 4*

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## The Bottom Line

**James Davis v. Glenn A. Kawesch, M.D., an individual; RK and Laser Eye Institute, a California entity of unknown organization; Laser Eye Centers of Southern California, a California entity of unknown organization**

Case Number: GIC 796520

Judge: Honorable J. Richard Haden

Plaintiff's Counsel: Joseph G. Dicks, Esq. and Eric Hoffland, Esq. of the Law Offices of Joseph G. Dicks

Defendant's Counsel: Daniel S. Belsky, Esq. of Belsky & Associates

Type of Incident/Causes of Action: medical malpractice, failure to obtain informed consent, and fraud and battery in connection with the performance of PRK and AK surgery on a patient with keratoconus

Settlement Demand: CCP §998 offer for \$175,000

Settlement Offer: Defendant served plaintiff with CCP §998 offer for zero dollars and a waiver of costs

Trial Type: Jury

Trial Length: 5 days

Verdict: Defense

### **Burin v. Ellison, et al.**

Case Number: 03CC07027 (Orange County)

Judge: Honorable David R. Chaffee

Plaintiff's Counsel: Robert K. Scott, Esq.

Defendant's Counsel: Carl H. Starrett II, Esq. of Paul K. Schrieffer, LLP

Type of Incident/Causes of Action: Legal Malpractice

Settlement Demand: None

Settlement Offer: None

Trial Type: Jury/Judge

Trial Length: N/A

Verdict: The court sustained demurrers by both defendants based on the statute of limitations. Plaintiff did not amend his complaint and the court later granted each defendants' separate motions to dismiss, with prejudice.

## The President's Message...



*Billie Jarosek*

Upon learning that I had been elected President of the San Diego Defense Lawyers for the year 2004, my friends congratulated me and then in the next breath I asked, "What does SDDL do?" It occurred to me that there may be a good number of our members who do not know what SDDL does. Although SDDL is involved in charity work and helps promote camaraderie between its members, primarily, SDDL focuses on education for its members.

Every month SDDL promotes, selects speakers, and conducts a one-hour brown bag seminar on the various subjects that the State Bar of California requires to satisfy the MCLE requirements. In January, there was a seminar on "Elimination of Bias" and in February there was one on Medical Records and Terminology. There will be one-hour brown bag seminars in the months of March, April, May, June, July, August, September, October, November and December 2004.

For the more substantial subjects, SDDL arranges, promotes and conducts two-hour seminars which are held in the evening at the U.S. Grant Hotel. These two-hour seminars are reserved for those subjects that need to be covered more in-depth to give members greater insight to those subjects which cannot be covered in a one-hour time period. Speakers for these seminars come from our own membership, as well as recognized experts in various fields.

With respect to our charity work, SDDL sponsors a golf benefit, usually in October to raise money for the Juvenile Diabetes Foundation. This October, will be our third annual golf benefit. We are hopeful that with all members participating, our contribution to the Juvenile Diabetes Foundation will exceed that of prior years.

In addition to keeping these ongoing programs up and running, it is my personal goal this year to increase our membership. I believe that SDDL has a lot to offer to the defense attorneys in our community.

Sincerely,

*Billie Jarosek*

## Brevity, Clarity, and Grace

by Peter D. Gray, Esq. of Rider Bennett

When I was in law school, a distinguished federal circuit judge lectured regarding his criteria for an effective appellate brief. His advice boiled down to three concepts: brevity, clarity, and grace. Stick to these concepts when drafting briefs, the judge assured us, and we would be well on our way towards becoming capable brief writers.

At the time, I did not appreciate the soundness of this advice. I could grasp somewhat the importance of "clarity"—to be an effective advocate, I had to be understood. But "brevity" and "grace" left me cold. I thought that I was not going to defeat my opponents quickly and graciously, but instead was going to mercilessly savage them, while taking all of the time and space allowed in so doing.

Several years of practice have had at least one salutary effect: I am now sufficiently humbled to consider anew the hard-earned wisdom of those having been in this profession longer than I. Among these formerly neglected pearls of wisdom are the judge's suggested concepts—brevity, clarity and grace—which I now view as benchmarks of effective brief writing. Further, I would add the concept of "candor" to this list.

### Brevity

In appellate briefs, less is usually more. Most appellate rules allow ample space to fully advocate the client's position. In the federal circuit courts, a principal brief can contain up to 14,000 words, and a reply brief up to 7,000 words. The most effective briefs typically are much shorter. This is particularly true of respondents' briefs. The respondent has already won below—it should not take 13,999 words to explain why the lower court's decision should be affirmed. Briefs should be brief.

### Clarity

Clarity is critical to the success of an appellate brief. The most winning legal argument is worthless if the appellate court cannot comprehend it. Recently, in *Racicky v. Farmland Industries, Inc.*, 328 F.3d 389, 398 n.9 (8th Cir. 2003), the court pointedly rebuked an attorney for ignoring the concept of clarity:

We are frustrated by the failure of the Racickys to cite specifically to the record in support of their lost profits argument. ... With a record spanning thousands of pages, citing scores of scattered pages at a time is not helpful.

Not surprisingly, the clients did not prevail on the lost profits argument. Moreover, no lawyer likes to see his or her work product disparaged in such terms, regardless of the outcome.

### Grace

Judges hate it when lawyers engage in mudslinging and name-calling. They are not at all interested in the fact that you believe your opponent to be "an ass, a fool, and a prating coxcomb." Shakespeare, *Henry V*. Indulging in such behavior distracts from the real issues at hand, and seldom serves the clients' interests. See, e.g., *Regner v. Northwest Airlines, Inc.*, 652 N.W.2d 557, 564 (Minn.App. 2002), in which a judge chastised respondent's counsel for "ad hominem and irrelevant arguments against appellant and appellant's counsel."

An even greater sin is casting aspersions upon the lower court. Recently, the Indiana Supreme Court sanctioned an appellant's local counsel for the following statement: "Indeed, the Opinion is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee Sports, Inc., and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision)." Although counsel did not actually write the offending words, he signed the finished brief, and the court initially sanctioned him with a 30-day suspension from practice. In *the Matter of Wilkins*, 777 N.E.2d 714 (Ind. 2002) (on rehearing the court reduced the sanction to a public reprimand). Be polite. It is both good manners and good advocacy.

### Candor

Being candid with an appellate court is especially important because that court makes its decision on the basis of the record. Consequently, the record must support every factual assertion made in the briefs. Counsel must present the facts fairly and in context, and must not ignore unfavorable facts. "Attorneys, as officers of the court, have the responsibility to present the record with accuracy and candor. On those rare occasions when attorneys fail to do so, the self destruction of their credibility almost inevitably carries with it damage to their client." *Pinkham v. Sara Lee Corp.*, 983 F.2d 824, 833 (8th Cir. 1992).

Further, counsel is obligated to advise the appellate court of all controlling cases or statutes, whether they support or detract from the client's position. In *Newhouse v. McCormick & Co.*, 130 F.3d 302 (8th Cir. 1997), the court sanctioned counsel for failing to disclose that his ostensible supporting authority had been reversed several years earlier: "[I]t is one thing to argue zealously for a change in law; it is altogether quite another thing to represent that the law is something it is not." *Id.* at 304-05.

These concepts are all matters of common sense. Appellate judges are human beings, and as such, they do not appreciate being bored, confused, insulted, or misled. Applying the concepts of brevity, clarity, grace, and candor avoids these pitfalls and makes for better briefs and advocacy.

*Author: Peter D. Gray is a lawyer with the Minneapolis firm of Rider Bennett. His practice concentrates on employment law and appellate advocacy.*

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## The Bottom Line

### David Lee et al. v. David James Carro et al.

Case No.: 02CC01338

Judge: Honorable Mary Fingal-Erickson

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

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

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

Settlement Demand: 5 million from all defendants

Settlement Offer: 998 for a waiver of costs

Trial Type: Jury

Trial Length: 4 weeks

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

### Kristine A. Cook; Lawrence A.

Radebaugh; Gerald R. Radebaugh; Debra D. Boulette; David D. Taylor v. John Gordon, M.D.; Sharp Memorial Hospital; Gregory B. Mahan, M.D.; Brian Jaski, M.D.; Ronald Miller, M.D.; Ada Marin, M.D.; Currien McDonald, M.D.; Casandra Stroud, M.D.; and Does 1 through 100, inclusive

Case No.: GIC 805277

Judge: Honorable William C. Pate

Plaintiff's Counsel: Bruce M. Bunch, Esq., Contos & Bunch

Defense Counsel: James D. Boley, Esq., Neil, Dymott, Perkins, Brown & Frank

Type of Incident/ Causes of Action: Medical Malpractice - Alleged failure to refer patient for emergent coronary artery bypass grafting procedure

Settlement Demand: \$75,000 made after defense opening statement.

Settlement Offer: Waiver of Costs

Trial Type: Jury

Trial Length: 5 days

Verdict: Defense

## "Toxic" Mold Litigation . . .

*Continued from page 1*

Toxic mold cases are usually far more complex than the typical personal injury action. The sheer number of people who can be exposed to mold in a high-rise building is staggering, and class actions are being filed on behalf of groups of building occupants. For instance, in October of 2001, a group of Louisiana plaintiffs, who were employees of several state agencies located in a privately-run office building, filed a class action lawsuit against the realty company and the companies who leased and operated the building, asserting that they had suffered personal injuries from exposure to toxic mold in the building. The defendant realty company was required to pay \$7,000 in sanctions for alleged failure to comply with a consent order regarding environmental testing of the building for plaintiffs' discovery purposes. See *Watters v. Department of Social Services*, 849 So.2d 734 (La.App. 2003).

In addition to the typical torts generally pleaded in personal injury cases, mold litigation often involves contractual issues, such as breach of lease or breach of warranty claims. But perhaps the most complex aspect of these cases is the causation issues they present.

### Causation

Plaintiffs typically try to prove general causation through epidemiological studies purporting to establish that exposure to mold increases the risk of a particular injury. Then they try to show specific causation through expert testimony establishing that their dose of exposure was sufficient to cause their particular injury.

The problem for plaintiffs is that their typical symptoms can have many other causes, such as the flu, obesity, inactivity, stress, and other environmental/indoor air quality factors, such as tobacco smoke, radon, carbon monoxide, formaldehyde, pollen, dust, mites, and other allergens. It may be difficult, if not impossible, to segregate the effects of these multiple sources of possible allergy or irritation.

Because of these unique causation issues, mold cases tend to become battles of the experts, battles often won or lost at *Daubert/Frye* hearings.

### A MultiDisciplined Approach

As a result of the complexities of mold problems, many areas of legal, scientific, and medical expertise are needed to address them. Take the hypothetical case of a developer that purchased a high-rise building and remodeled and expanded the facility. The developer then sold the facility to an entity that will operate it as a business and residen-

tial facility. If mold develops in the facility, there are multiple entities—including the developer/seller, the buyer/owner/operator, the building design and construction teams, and the employers located in the building—that face possible claims by many potential plaintiffs, including apartment residents, businesses leasing space in the facility, and employees of the businesses operating out of the facility.

Despite their typical immunity from suit under workers compensation statutes, the businesses in the building may face lawsuits by their own employees, asserting that mold illnesses are covered under the Americans with Disabilities Act. More and more employees are seeking ADA work accommodations, such as relocations and air purifiers. The owner/operator will also have concerns about possible class action lawsuits being filed on behalf of residents or workers who were allegedly exposed to mold in the building.

Because the problems presented by mold are multifaceted, they require a multidisciplinary approach. In the hypothetical, it may be advisable to conduct indoor air quality sampling and testing to determine whether the mold is of a "toxic" variety. The testing is done by industrial hygienists and toxicologists. Depending on the results, a decision must be made, in consultation with appropriate experts, whether to relocate residents, businesses, and employees in the contaminated portion of the facility, both for their safety, and so that their portion of the facility can be sealed off, preventing mold spores from getting into the ventilation system and spreading throughout the building.

### Remediation

Before the mold can be remediated, its cause must first be determined. Since mold is usually caused by some sort of moisture, water intrusion experts should be consulted to find and fix the problem before the mold is removed. Otherwise, the mold will simply grow back.

Care must be taken in the selection of a qualified, insured remediation contractor. A proper remediation should be conducted under controls similar to those used with asbestos. The scope of work and standard of care should be developed in consultation with environmental counsel and should be monitored by a building integrity consultant, a firm that formulates and implements compliance programs designed to assure that the work contracted for is performed in the manner agreed upon. Then, post-remediation testing should be considered by the team.

## Providing Legal Counsel

Both tenants and the building owner will want legal counsel to analyze their rights, if any, under their leases. They will also want counsel to consider their rights under any maintenance contracts that may be in effect. The owner will likewise want its real estate attorney to examine the agreement of sale in connection with its purchase of the facility, to determine whether the buyer or the seller bore the risk of mold. Both the owner and the developer will want counsel to read the construction contracts to determine their rights, if any, against the design professionals or construction contractors.

Most importantly, everyone will need to have coverage counsel examine their insurance policies—both property and liability—to determine if their situation is covered. If so, they will need to put their insurance carrier on notice early, often, and in writing. Ultimately, they may also need to bring a declaratory judgment or bad faith action to recover.

## Toxic Mold Response Team

To tackle these diverse issues, defense lawyers are well advised to work with a multidisciplinary team focused on mold response. The size of the team will vary depending on the extent of the client's real estate holdings, risk tolerance, and mold insurance coverage.

Regardless, the team should consist of some combination of water intrusion experts, indoor air quality consultants, industrial hygienists, building integrity consultants, toxicologists, epidemiologists, physicians, remediation contractors, and public relations experts. The legal team will also need a cross-section of experience in real estate, environmental, employment, and insurance coverage law, as well as toxic tort and construction litigation. Of course, it is advisable to have legal counsel retain the technical experts in order to protect any investigation under the attorney-client privilege and/or the work product doctrine, to the extent possible.

The expertise of many of these team members is needed because of the lack of federal or state regulations or guidelines for evaluating the potential health risks associated with mold. Neither the federal Environmental Protection Agency (EPA) nor the Centers for Disease Control (CDC) has determined what dose of exposure demonstrates a causal link between mold and adverse health effects. Moreover, neither EPA nor the CDC has established an acceptable cleanup standard. Indeed, the Institute of Inspection, Cleaning and Restoration Certifications recently (December 2003) published standards and reference guide urges a multidisciplinary approach to mold. For these reasons, it is critical to form a team and develop and implement a standard of care designed to avoid subsequent exposure to claims.

Those defense attorneys who are the most knowledgeable about the array of issues involved in mold litigation will be best prepared to protect their clients. Defense lawyers are encouraged to retain a team of experts with a breadth of experience in dealing with mold claims—including attorneys with varied specialties. This team will provide the resources necessary to tackle the issues involved in the complex and often unclear realm of toxic mold litigation.

Once a mold response team is in place, it can take certain preemptive measures before a mold problem arises. If a problem is discovered, in order to either reduce the client's risk of mold liability or shift the risk to others, some reactive measures should also be considered.

## Preemptive Measures

- Performing due diligence audits prior to acquisitions of real property.
- Drafting and negotiating specific contract clauses, including indemnification and warranty clauses.
- Establishing compliance protocols for the design and construction process and monitoring the same.
- Responding aggressively to moisture problems.
- Evaluating current insurance coverage and purchasing additional insurance products to address the risk of mold, if necessary.

## Reactive Measures

- Investigating the causes of any mold infestations.
- Analyzing leases, maintenance contracts, construction documents, and real estate agreements to determine liability issues and liable parties.
- Prosecuting and/or defending claims against the responsible parties.
- Pursuing insurance claims.
- Developing remediation programs and the scope of work/standard of care, and implementing same.
- Evaluating the issue of whether to evacuate the building and relocate the occupants.
- Developing a communications plan to deal with employees, tenants, and the media.

*Brian J. Clark and Deborah A. Little are shareholders in the national law firm of Buchanan Ingersoll. They co-chair the firm's Toxic Mold Response Team. The authors wish to acknowledge the assistance of Michael J. Cetra, a summer associate at Buchanan Ingersoll. Patricia P. Hollenbeck, also a member of the Toxic Mold Response Team, is a shareholder in the firm's San Diego office.*

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## The Bottom Line

### Tomei v. Vanderveen

Case Number: GIN020906

Judge: Honorable Thomas N. Nugent

Plaintiff's Counsel: Saul D. Wright, Esq.

Defendant's Counsel: Carl H. Starrett II, Esq.  
of Paul K. Schrieffer, LLP

Type of Incident/Causes of Action: Legal  
Malpractice

Settlement Demand: None

Settlement Offer: Waiver of Costs

Trial Type: Jury/Judge

Trial Length: N/A

Verdict: The court granted Defendant's  
Motion for Terminating Sanctions based on  
Plaintiff's failure to participate in discovery  
and disobedience of discovery orders.

### Patricia Wright v. Rei Do Gado

Restuarant, Paul Gi, ABC American  
Valet, Jamie Velarde, Carlos Wellman,  
and Carlton Britt

Case Number: GIC804284

Judge: Honorable Jay M. Bloom

Plaintiff's Counsel: Yolanda Owens, Esq. (pro  
hac vice) under the Law Office of Ruth B.  
Herch

Defendant's Counsel: Constantine Buzunis,  
Esq. of Neil, Dymott, Perkins, Brown &  
Frank

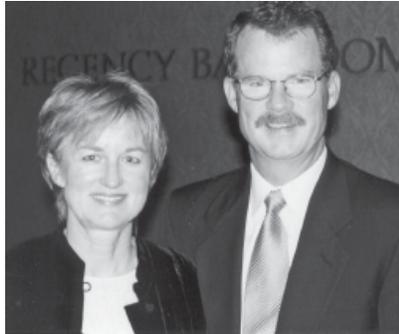
Type of Incident/Causes of Action: Employer/  
Independent Contractor issue. Defendant  
valet driver hit Plaintiff as she was crossing  
the street with a customer's SUV. Plaintiff  
claimed a brain injury with seizures and  
memory loss, post traumatic stress, neck,  
back, etc and claimed \$12.5 million dollars  
in damages.

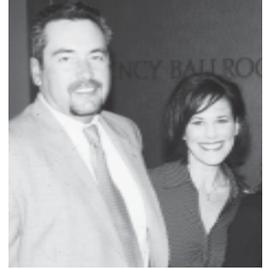
Settlement Offer: \$5,000

Trial Type: N/A

Trial Length: N/A

Verdict: The court granted Defendant's  
Motion for Summary Judgment one week  
before trial.





# Member News

**Fredrickson, Mazeika & Grant, LLP**, is pleased to announce that Karen L. Bilotti has joined the firm. Karen brings more than 14-years of litigation and trial experience to the practice, and has taken at least 30-cases to jury verdict. She will continue to litigate matters in a variety of cases, including toxic torts, construction defect, medical malpractice, premises liability, malicious prosecution, and personal injury.

**The Law Offices of Elizabeth Skane** has added associate William Frazier, a 2003 graduate of Thomas Jefferson School of Law.

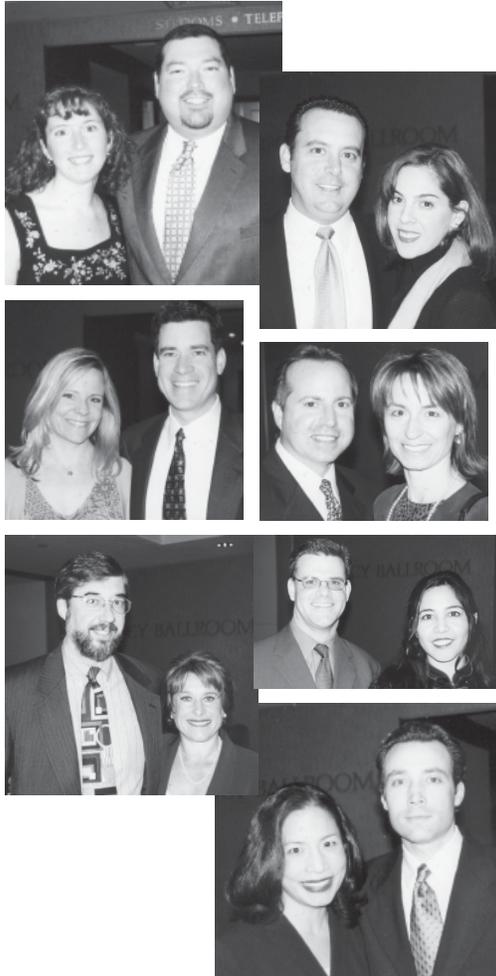
On January 31<sup>st</sup>, 200 members and guests gathered at the Manchester San Diego Hyatt Hotel to enjoy an evening of camaraderie and to honor **Judge John S. Rhoades and David G. Brown, Esq.** The reception was terrific, the food was excellent, the band was rockin' and the presentation of the awards for Honoree of the Year and San Diego Defense Lawyer of the year gave those gathered for this event some new insight into the character and accomplishments of both honorees.

*The following is an excerpt page from the*

## **"We Love Our Community Partners" Winter 2003 San Diego Juvenile Diabetes Foundation publication entitled DISCOVERIES:**

"On Friday, October 24, the San Diego Defense Lawyers (SDDL) held their Second Annual Golf Benefit. Last year, the event raised \$2,500 for JDRF and we anticipate that SDDL will bring in even more from this year's tournament. Participants enjoyed a healthy competition, playing golf with their favorite people, a little good old-fashioned razzing and of course, a day away from the office! Golfers arrived and received a goodie bag, warmed up on the driving range and putting green and were off on a shotgun start. There were many games, along with refreshments and even a taco stand along the course. After a beautiful day of golf, participants were treated to a BBQ and a raffle full of great prizes. Just about everyone left with at least one prize. Special thanks to Chair Dino Buzunis of Neil, Dymott, Perkins, Brown & Frank and Co-chairs Bill Jaroszek of Fredricksen, Mazeika & Grant and Peter Doody of Higgs, Fletcher & Mack."

SDDL's 2nd Annual Golf Benefit raised \$6,500 this year for the Juvenile Diabetes Foundation! We hope to raise even more in 2004!!!!



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MEDIATION WORKS

# Avoiding Bias in the Legal Profession

By Shari I. Weintraub, Esq. of Fredrickson, Maziaka & Grant

San Diego Defense Lawyers' first brown bag seminar of the year was presented on January 15, 2004. Lesa Wilson and Jack Sleeth, partners at Stutz, Artiano, Shinoff & Holtz, both specializing in the practice of employment litigation, spoke on the topic, "Elimination of Bias in the Legal Profession".

Bias is generally a function of one's subjective beliefs regarding sex, color, race, religion, ancestry, national origin, physical disability, age, and sexual orientation, and how those beliefs affect decisions in the workplace. The elimination of bias in the legal profession is a goal of the State Bar and its members. Recognizing that we are all victims of our own personal beliefs, the seminar identified three (3) potential problem areas (hiring, performance, and client representation), and provided practical techniques to avoid including bias in the decision-making process. Focusing on the job requirements, consistency and common-sense are key. Indeed, California has codified anti-discrimination in the legal practice, making it a violation of ethical standards. (Rules Prof. Conduct, rule 2-400.) In sum, Rule 2-400 requires that:

**B)** In the management or operation of a law practice, a member shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability in:

- (1) hiring, promoting, discharging, or otherwise determining the conditions of employment of any person; or
- (2) accepting or terminating representation of any client.

## Potential for Bias in the Hiring Process

Hiring personnel for a law office requires a multi-step process: recruiting applications and resumes, interviews, and selection. To attract a more diverse pool of candidates, hiring partners and personnel should prepare job advertisements and posting which avoid any potentially perceived exclusionary language, and place advertisement in publications which have a broad and diverse readership. Importantly, if art is to be included in your advertisements, be sure to include a photo which shows a diverse candidate pool.

Once the applications and resumes arrive in your office, advise the staff to tape or otherwise block-out the name of the candidate. Some candidates include information of a personal nature in their resumes, such as birth dates, gender, and marital status. Merely because it is included does not make the information fair game in the decision-making process. Therefore, you should advise that any personal information also be blocked-out. All this information can often trigger known and unknown biases. Blocking out the information allows the decision-maker to focus their initial analysis on the candidate's experience, skills, training directly related to the position advertised. Wilson and Sleeth also advise that care be taken in making notations on the application/resume. While such notes can assist the decision-maker in evaluating the candidate's abilities, such notations should be focused on the skills the position requires. Always keep in mind that, in the event of a potential claim of discrimination, such notes can be used as evidence of one's state-of-mind.

Obviously, blocking out the information on the application/resume can only occur initially. Eventually, if the candidate meets your job-position criteria, a face-to-face interview will disclose information which cannot otherwise be blocked out. It is very important at this stage to stay focused, and ask questions which are strictly job-related, do not invade the candidate's privacy, and are non-discriminatory in nature. Examples of inappropriate areas of questioning include: marital status (including a name change), age or date of birth, race, national original, birthplace, religious affiliation, hobbies or clubs which could indicate a potential candidate's affiliation with a protected category, height or weight (unless related to the job requirements), and medical condition. The list is not exhaustive. Even if, for example, it is apparent the candidate has a medical condition or disability (whether physical or mental), you cannot ask the candidate about them. You may only ask whether they can perform the essential functions of the job. Note that applicants may not be asked to take a job-related physical until after an offer of employment is made. In addition, *treatment* for drug and alcohol addiction may qualify as a disability, although the addiction itself is not considered a disability.

Selection of any candidate requires care be taken to ensure the final selection is based upon job-related objective criteria, to the extent possible. Last, it is suggested that all applications, resumes, and interview notes be maintained, because statistical evidence can be used to prove discrimination in the hiring process.

## Potential for Bias in Job Performance Analysis

Once hired, the next potential trap is in the area of job performance. Here, Wilson and Sleeth identified three (3) specific areas, evaluations, discipline and termination, and promotion. Evaluations should be based upon objective standards because subjective criteria tend to allow judgments based upon individual biases. Where subjective criteria imposes itself into the process, it can be construed by your employees as unfairness and undermine morale. Include specific examples of strengths and weaknesses, and be honest and accurate.

Disciplinary procedures should be consistent, whether a progressive or another approach is used. Before you take disciplinary action, you should assure yourself that the decision is rational, fair, and free from bias. Questions to ask include 1) whether the standard being applied is reasonable, 2) whether the performance standard was clearly communicated to the employee, 3) whether there is sufficient evidence the standard was violated, and is it documented, 4) was the employee adequately trained, 5) are there extenuating circumstances, 5) is the proposed discipline reasonable and appropriate for the violation, and 6) was the treatment and penalty applied consistently in the same or similar circumstances?

Promotion is a "hot-button" topic when it comes to the elimination of bias in the legal community. To this day, women, ethnic minorities, older attorneys and attorneys with disabilities are underrepresented. For example, fifty-percent (50%) of law school graduates are women. That statistic drops significantly once out in the real world. Wilson and Sleeth suggest mentoring your employees, including those in the underrepresented groups. Education, similar to the seminar referenced here, helps as well. And, as with everything else, consistency is important.

## Conclusion

Whether we like to admit it or not, we all bring our own personal belief system to the employment world. However, if we first acknowledge that possibility and then account for it by focusing on job requirements, consistency and common-sense, those of us working in the law office environment are well on our way to diversifying the profession, one person at a time.

## Meet Your 2004 Board of Directors – Officers

### Billie Jaroszek – President



“Billie”, as she is known to her many friends in the litigation community, grew up in the construction business and describes her specialization in that practice area as “perfectly natural.” Since her admission to the Bar, she has focused her practice in complex civil litigation and has developed an expertise in construction defect claims. She has represented all sides of construction-related actions and was trial counsel for a client/subcontractor in one of the first multi-party construction defect cases tried in San Diego County. That experience has resulted in her being called upon by the Superior Court to act as a Special Master in order to obtain an efficient resolution of these types of cases. Additionally she practices in the areas of employment, products liability, business litigation, insurance law; general liability and toxic torts. Not long after commencing practice Billie formed her own firm, and was its managing partner until she elected to join forces as a partner with Fredrickson, Mazeika & Grant.

Billie is a member of the San Diego County Bar Association and its Construction Law subcommittee. She has served as Chair for the San Diego Bar Association Law Week for several years. She is also a member of the litigation section of the American Bar Association as well as the Defense Research Institute. She has been an active member of the San Diego Defense Lawyers Association and has served as an officer on its Board of Directors. She lectures for the San Diego County Bar Association on various aspects of Construction Law and General Liability.

On A Personal Note: Billie tells us that she and her husband Joe can often be found pursuing their hobbies of golfing, Country Western line dancing, and spoiling their grandchildren.

### Michelle Van Dyke – Vice – President



Michelle is a founding partner of Shewry & Van Dyke. She is experienced in the defense of and has litigated cases including premises liability, products liability, professional liability, automobile accidents, personal injury, employment law issues, construction defect, and construction site accident claims for national construction companies. The product liability cases have involved construction equipment, food products, and recreational equipment. She also has experience in automobile cases which include long-haul trucking accidents resulting in both fatal and serious personal injuries. The professional liability cases encompass medical and dental malpractice, engineer, contractor, insurance brokers and subcontractor liability.

Michelle is an active member of the State Bar of California, the American Bar Association, the San Diego County Bar Association, as well as San Diego Defense Lawyers Association. She is also a member of the Building Industry Association and the Risk and Insurance Managers Society. Michelle has been accepted into the American Inns of Court, Louis M. Welsch, Chapter #9. She received her undergraduate degree from California State University, San Diego and attended Western State University College of Law.

### Dino Buzunis - Secretary



Dino is a senior litigator and shareholder of Neil, Dymott, Perkins, Brown & Frank. He represents individuals, professionals, and corporations in both insured and self-insured matters.

Dino is an active member of Association of Southern California Defense Counsel, San Diego County Bar Association, San Diego Defense Lawyers, and Building Industry Association, San Diego Chapter. He served a term on the State Bar Board of Governors and also served terms as President and Director of the California Young Lawyers Association. He has written legal articles for the Los Angeles Daily Journal and San Francisco Daily Journal and has been a lecturer/instructor for the State Bar of California, for insurance carrier employees, and in the Trial Advocacy Program of the University of San Diego Law School. He continues to serve as a Judge Pro Tem and an Arbitrator for the San Diego County Superior Court.

Dino is also actively involved in the San Diego community, donating time to various organizations such as Presbyterian Crisis Outreach Center, Barrio Station, Monarch High School, San Diego Police Foundation, St. Spyridon Church, Juvenile Diabetes Research

Foundation, and the San Diego Blood Bank. He received his undergraduate degree from University of Manitoba, Winnipeg, Manitoba, Canada and his J.D. from Thomas M. Cooley Law School.

### John Farmer – Treasurer



John is the founding and managing partner of Farmer & Case. He focuses his practice in general civil litigation, with concentration in the areas of vehicular, products and

premises liability, medical and professional malpractice, director's and officer's liability, government entity liability, toxic torts, construction injuries, insurance coverage and bad faith actions, and general business litigation. He is also actively involved in business transactional work for small and medium-sized businesses, including business formations, acquisitions and sales, and employment and contract matters.

He received a Bachelor's of Arts degree from Marquette University and graduated law school at the University of Montana at Missoula. Upon graduation John had the unique opportunity to serve as clerk to Montana State Supreme Court Justice John C. Harrison.

A former participant in the “Big Brother” program, John is known in the San Diego Community for his active involvement and enthusiasm for local YMCA Indian Guides and Indian Princess programs, in which he has served as “Nation Chief” and Council Member. He has donated his time, interest and experience to local community groups as well, having served as officer and director of three residential community associations. Mr. Farmer resides in the Carmel Valley area of San Diego with his wife, Linda, and their twins, Ryan and Stephanie. He is actively involved in competitive physical sports, and it is not unusual to see him competing in a tennis or tae kwon do tournament, running a marathon or climbing Mt. Shasta. He is also a guitar slinger and one of the founding members of a successful local rock band, Left4Dead, and has played as the opening act with such rock/blues luminaries as B.B. King, Buddy Guy, John Hiatt, and Chris Isaac.

## "Understanding Medical Records and Medical Terminology"

By: Joel B. Mason, Esq. of Stutz, Artiano, Shinoff & Holtz

Hypothetical: The Plaintiff is a 5'8", 275 lb., 45 year old male who complains of, among other things, a prolonged knee injury allegedly suffered in an automobile accident. Plaintiff claims that his knee slammed into the dashboard of his truck and the evidence supports this conclusion. Among the various reports you obtained is a medical report showing damage to the meniscus of the medial compartment of the Plaintiff's left knee. OK?

Not according to Dr. John L. Chase, orthopedic surgeon and president of Benchmark Medical Consultants, who presented "Understanding Medical Records and Medical Terminology" on Thursday, February 12. If a knee were to hit a hard object straight on with significant force, an expected injury would be to the patella, or knee cap. The biomechanics of an injury from the incident as described would not likely result in prolonged injury to the meniscus, inside the knee. So something else is going on. This is a simplistic example, but it illustrates the focus of Dr. Chase's presentation.

While obtaining and reviewing medical records is standard operating procedure for case preparation, the value of information that can be gleaned from medical and associated records should not be underestimated. The more complex the injuries, the more critical it is to understand the information. Dr. Chase revealed how the data in medical records, traffic collision, lab and emergency room reports, patient questionnaires and history, past and present physical exams, etc., can reveal, for example, causation factors, effectiveness of treatment options, and ongoing treatment needs, to name just a few areas. A lawyer can read, review, and analyze records and gain a great deal of understanding about an incident. But a specialist or sub-specialist such as a medical professional, trained in analyzing the multitude of reports and records that are part of every injury related case, can spot discrepancies and inconsistencies and piece together a different story, or at the very least alter a Plaintiff's explanation. These discrepancies and inconsistencies will frequently point to other causative factors or pre-existing conditions related to the injury and thus the liability and damage elements of a case.

The main points of the presentation were that a proper evaluation of a party's injuries calls for gathering as complete a set of records as possible and analyzing all the information with a knowledgeable understanding of the type of injury suffered. The value of such an analysis could be crucial to your case.

## Letters to the Editor

Changes are coming. Some subtle, some not. Courts are becoming increasingly overburdened. Hollywood again moves to Sacramento. And the social and political barometers swing away from center to stay ahead of the firestorm raging from a spark ignited during an halftime performance in this election year. And while some members, friends, and family pass away; others bring new life into the world looking for a bouncing knee.

SDDL has changed as well over the past months. We first congratulate our new President Billie Jaroszek, Vice-President Michelle Van Dyke, Secretary Constantine D. Buzunis, and Treasurer John T. Farmer. Their leadership, dedication, personal enthusiasm, and commitment to SDDL will serve this non-profit organization well. Other changes will be reflected in the Brown Bag luncheons, evening seminars (both free to members), and in the future publications of THE UPDATE. One objective is to provide a forum for the mutual education of its members through the exchange of ideas.

Accordingly, we at THE UPDATE welcome information on new or changing members or office openings, recent trial results, recent success stories with MSJ, JNOVs, SLAPPS, articles on office management, the law, legislature activity, and personal triumphs or failures, or otherwise. We are also adding this "Letter to the Editor" column. THE UPDATE welcomes your comments, suggestions, tips, words of wisdom, and anything else you wish to share. Please send letters to Editor, c/o San Diego Defense Lawyer, P.O. Box 927062, San Diego, CA 92122. Or e-mail us at [kboruszewski@stutzlawfirm.com](mailto:kboruszewski@stutzlawfirm.com). Being lawyers, however, THE UPDATE reserves the right to edit all submissions for space considerations. Life is 10% change, 90% reaction. Be part of the change - become involved in SDDL.



L to R: Steve Polito, Dennis Aiken, Dino Buzunis, Scott Barber, Billie Jaroszek, Kelly Boruszewski, Martha Dorsey, Michelle Van Dyke, Sean Cahill and John Farmer. Not Pictured: Ken Greenfield

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### Membership Information

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

*THE UPDATE is published for the mutual benefit of the SDDL membership, a non-profit association composed of defense attorneys, judges and persons allied with the profession as suppliers of goods or services.*

*Views and opinions expressed in THE UPDATE are those of the authors and not necessarily those of SDDL. Products and services advertised are paid advertisements and not endorsed by SDDL.*

*We welcome the submission of articles by our members on topics of general interest to our membership. Please submit material to:*

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