

The Update

Summer 2006

SAN DIEGO DEFENSE LAWYERS

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The Bottom Line

Case Title: Hosie Tevis v. Prudential Property and Casualty Insurance Company; The Szaras Companies

Case Number: GIC 831790

Judge: Honorable Linda B. Quinn

Plaintiff's Counsel: Gerald Sarte, Esq., David Chan, Esq. and Lincoln Quintana, Esq.

Defendant's Counsel: Thomas W. Byron and Lili Mostofi of Byron Edwards Mostofi, APC for The Szaras Companies

Type of Incident/Causes of Action: Plaintiff alleged that her home was contaminated by mold and that The Szaras Companies was professionally negligent in the performance of its industrial hygiene services (performed for Prudential, not Plaintiff).

Settlement Demand: \$2,500,000.00 jointly to Prudential and The Szaras Companies

Settlement Offer: Waiver of costs by The Szaras Companies

Trial Type: Judge Quinn granted The Szaras Companies' motion to dismiss after Plaintiff's toxicologist and industrial hygienist experts were disqualified after the court's rulings on motions in limine.

Trial Length: Three days of motion in limine hearings.

Result: The matter ultimately settled after the court's rulings for a waiver of costs in exchange for Plaintiff's waiver of her appellate rights to challenge the court's rulings.

President's Message



San Diego Defense Lawyers takes great pride in supporting the Juvenile Diabetes Research Foundation (JDRF) by donating proceeds from its annual golf benefit to JDRF. Although most of us are aware of diabetes, we may have some misconceptions and misunderstandings regarding this illness and the goal of the Juvenile Diabetes Research Foundation. Diabetes (medically known as Diabetes Mellitus) is the name given to disorders in which the body has trouble regulating its blood glucose or blood sugar levels. There are two major types of Diabetes: Type 1 and Type 2. Type 1, also called Juvenile Diabetes, or Insulin Dependent Diabetes, is a disorder of the body's immune system wherein certain cells in the pancreas are attacked and destroyed. This prevents insulin from being produced. Glucose then stays in the blood where it can cause serious damage to all organ systems of the body. Generally, Type 1 Diabetes is diagnosed in children, teenagers or young adults. There is currently no cure for diabetes.

There are certain common myths and misconceptions that are worth noting.

Myth No. 1: Diabetes is caused by obesity or eating too much sugar. The fact is that while obesity has been identified as one of the triggers for Type 2 Diabetes, it has no relation to the cause of Type 1 Diabetes. Scientists generally believe that both genetic and environmental factors are involved in causation for Type 1 Diabetes. Eating too much sugar has not been shown to be a factor.

Myth No. 2: You have to be a kid to get Type 1 Diabetes. Type 1 Diabetes, which is also known as Juvenile or Juvenile Onset Diabetes, is usually diagnosed in children, teenagers, or young adults. However, people may develop Type 1 Diabetes at any age.

Myth No. 3: Kids don't get Type 2 Diabetes. The fact is that although Type 2 Diabetes is usually diagnosed in adulthood, increased obesity and other factors have led to a recent "epidemic" of this form of Diabetes in young adults and children under the age of 10.

JDRF was founded by parents of children with Type 1 Juvenile Diabetes. JDRF has always focused on a single goal, which is accelerating research progress to cure Diabetes and its complications. To increase awareness and opportunities for contributing to this worthwhile cause, we encourage all San Diego Defense Lawyers members to visit the JDRF website for further information and opportunities to contribute. Please see www.jdrf.org.

Martha J. Rowsey

March Brown Bag THE ETHICS OF EXPERTS

By: Robert G. Bernstein, Esq.
of Shewry & Van Dyke

The San Diego Defense Lawyers were treated to another brown bag lunchtime CLE seminar on March 2, 2006. The seminar was presented by attorney David Cameron Carr, a specialist in legal ethics. Mr. Carr spent 12 years as a staff attorney with the State Bar of California. He now devotes his practice to representing attorneys in State Bar proceedings, providing advice intended to prevent attorneys from running afoul of the State Bar and to resolving fee disputes.

The seminar was divided into two main topics, ethical issues involving your own experts, and issues involving the other side's experts. Mr. Carr began by describing the difference between normative ethics, and descriptive ethics. Normative ethics are the codified rules of ethics and include the Rules of Professional Conduct, statutes and opinions of the State Bar and other associations. In contrast, descriptive ethics are what people actually do in practice.

In discussing ethical issues involving your own experts, Mr. Carr applied the two varieties of ethics. The normative or traditional view of an expert is that of an independent consultant, who applies their knowledge and expertise to the facts at hand, in order to educate and enlighten the jury. The descriptive or real world role of an expert in most cases is that of an advocate, who assists the attorney in trying to convince the jury that his/her client's position should prevail. Traditionally, an expert providing such assistance would be classified as a consultant, however, in most attorney-expert relationships, the line between consulting and serving as an expert has become blurred and experts routinely begin their role in a case as a consultant and are later designated as an expert. As most seasoned attorneys know, as a practical matter, experts tend to be retained by one side or the other and Mr. Carr noted that an expert's opinions tend to undergo a "solidification process" over time.

Mr. Carr reminded the audience that a consultant's opinions are not subject to discovery, but that once an expert is formally designated, he ceases to be a consultant and his opinions, and the basis of them, are discoverable. If the expert is de-designated and returns to consultant status, his/her opinions again become non-discoverable.

Mr. Carr also commented on the rules related to retention of experts. Pursuant to California Code of Civil Procedure §283(1), an attorney has authority to bind a client, "in any steps of an action or proceeding upon his agreement." Pursuant to this provision, an attorney is impliedly authorized to retain experts on behalf of the client. Mr. Carr recommends, however, that the fee agreement or engagement letter articulate that retention of counsel includes express authorization for counsel to engage experts.

Liability for expert fees is shared by the attorney and client. As the client's agent, the attorney has implied authority to incur reasonable expenses on the client's behalf in retaining experts (See, California Civil Code §2319 re: agent's authority). Under agency principals, both the attorney and client will be liable to the expert for fees and costs, however, the attorney is entitled to seek reimbursement of those charges from the client.

Mr. Carr also discussed issues related to the experts hired by opposing counsel. For those experts currently serving as consultants or experts for the opposition, contact is not permitted. Such communications can result in sanctions, including the disqualification of counsel and the exclusion of evidence. (See, *Lewis v. Telephone Employees Credit Union* 9th Circuit 1996) 57 F. 3d 1537, 1558; See also, *Erickson v. Newmar Corp.* (9th Circuit 1996) 87 F. 3d 298, 303 – an attorney may not buy access to opposing expert by hiring the expert to work on another matter.) Permissible discovery relating to experts and their opinions is regulated by California Code of Civil Procedure §2034.010.

Malfeasance in matters relating to experts usually takes the form of motions to disqualify experts or counsel, according to Mr. Carr. In the case of experts, the court has inherent power to bar trial testimony by an expert who has obtained confidential information from an opposing party. (*Peat, Marwick, Mitchell & Co. v. Superior Court* (1988) 200 Cal.App.3d 272, 289.) In order to disqualify an expert, one must demonstrate that the expert had actual exposure to confidential information, not merely that there was a potential for such exposure. (See, *Collins v. State of California* (2004) 121 Cal.App.4th 1112, 1130.) Experts, unlike lawyers, may escape disqualification if it can be shown that they were screened from confidential information. (*Western Digital Corp. v. Superior Court* (1998) 60 Cal. App.4th 1471, 1487.)

As for counsel, a lawyer or law firm may be disqualified if an expert is retained who was formerly the expert for the other side. Disqualification may be ordered, even where the expert was not retained, but merely interviewed as a potential consultant. (See, *Shadow Traffic Network v. Superior Court* (1994) 24 Cal. App.4th 1067, 1084-1085.) Mr. Carr indicated that in the latter situation, proof of such communication shifts the burden of proof to the counsel opposing disqualification to show that no material or prejudicial information about the case was exchanged during the interview process. In at least one decision, however, a California court concluded in summary fashion that service as an expert for one party in prior litigation did not bar an expert from testifying on behalf of an adverse party in a later action, even if the subject matter of the cases was similar. (See, *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1996) 46 Cal.App.4th 778.)

Mr. Carr concluded his remarks with comments about appropriate conduct if you are the expert. He cautions attorney experts not to confuse their attorney advocate role with their expert consultant role. He does not believe that experts should be "hired guns," whose opinions are tailored for the party they represent. Instead, Mr. Carr advocates an independent analysis by experts, including attorneys serving as experts. He believes that lawyers must comply with their ethical obligations as members of the Bar and officers of the court, even when serving as experts. Such self-imposed regulation by attorneys in the capacity as experts and otherwise is what, in Mr. Carr's opinion, makes the judicial system work.

The expert ethics presentation concerned issues which most attorneys probably do not consider as they go about their busy days. A basic knowledge of what is permissible and what is prohibited regarding experts could be of great importance, however, in your current or future cases. The authorities provided by Mr. Carr provide a solid foundation from which to start your research on expert issues. In addition, Mr. Carr welcomes questions from member of the San Diego Defense Lawyers. You can reach him via e-mail at dccarr@ethics-lawyer.com.



The Bottom Line

Case Title: James Curry and Janice Curry
v. Tim Kantrud and State Farm Insurance

Case Number: San Diego County Superior
Court No. GIE 024194

Judge: Honorable Lilliam Y. Lim

Plaintiff's Counsel: Ian Fusselman, Esq. of
Thorsnes, Bartolotta & McGuire

Defendant's Counsel: Randall Nunn, Esq.
of Hughes & Nunn and James Robie,
Esq. of Robie & Matthai

Type of Incident/Causes of Action: Plain-
tiffs' home in Crest was destroyed in the
October 2003 wildfires. Plaintiffs claimed
that their State Farm homeowner's insur-
ance policy was insufficient to completely
rebuild the home. Plaintiffs sued State
Farm and their agent, Tim Kantrud, for
misrepresentation.

Settlement Demand: \$380,000

Settlement Offer: None

Trial Type: Jury Trial

Trial Length: 8 days

Verdict: Defense Verdict (11-1) (delibera-
tions 24 minutes) (12/06/05)

April Brown Bag *Estate Planning for Everyone*

April's Brown Bag program featured an estate planning presentation by attorney April C. Ball. April is an associate attorney at Grace Hollis Lowe Hanson & Schaffer LLM. She attended law school at California Western School of Law in San Diego and received her Master of Laws in Taxation from the University of San Diego School of Law. A frequent lecturer, April focuses her practice on estate planning, business transactions and asset protection.

The presentation explained estate planning tools, primarily the difference between will and trusts. April explained the need for both a will and a trust, as well as when each is appropriate.

Both a last will & testament and a revocable trust direct the transfer of assets and assign guardians for minor children. However, while a will is court-supervised, a matter of public record and necessitates court costs, a trust is self-supervised, private and free from court costs.

Although April encouraged the use of a trust, a will may be the appropriate estate planning tool for those with a fairly small estate. She cautioned that wills, where the estate value is \$100,000 or more, or that involve real property valued at more than \$30,000 are governed by the Probate Court. Probate Court involves time and money, both of which are avoided with a trust.

A revocable trust is set-up and funded during a person's lifetime. Aside from drafting the trust documents with the client's specific needs in mind and properly executing the trust, a trust must be funded to avoid Probate and estate taxes. To fund the trust, assets are transferred into the trust and new assets are titled using the trust's name.

April also explained that further estate planning is needed for business owners. Business owners need to include language providing for business continuance and asset succession in their trust. For example, a trust needs specific language, referred to as QSST, for a shareholder of an "S" corporation. Additional estate planning tools and techniques are also available for individuals with large estates, including charitable remainder trusts and gifting of family limited partnership interests

Any questions regarding estate planning, can be directed to April at aball@gracehollis.com.

June Brown Bag *Electronic Discovery – How to make it work for you*

On June 27, 2006, J.D. Turner of Lorber, Greenfield & Politio, LLP, presented a one-hour lunch seminar on one aspect of what has is known as the Electronic Communication Nation: Electronic Discovery.

The most economical electronic discovery requires work well in advance of litigation. Clients must be educated to preserve necessary documents and secure the ability to access those documents readily. To that end, counsel must work with their clients to identify, gather, review, and produce information when an opposing counsel issues an inspection demand. Absent this implementation, litigators will have a difficult time when litigation becomes a reality. On the other hand, litigators can offer a great value to their clients by having these issues addressed beforehand, enabling the client to be placed in a better position in any electronic discovery scenario.

Preventative Maintenance

Any preventive litigation tactics include educating your client about electronic discovery. This would include conducting a training session with your client's employees to discuss technical issues, legal obligations, what occurs at all levels of communications (e.g., e-mails) and storage mediums (e.g., DVD/CD-ROM, Hard drive, IDE, SCSI, USB, Firewire, Laptop & Desktop Computers, Zip & Jaz drives, backup tapes, DAT, and AITs).

Counsel will also need to provide their client with the current and jurisdictional-specific counseling. A good place to start is section 2017.010 and 2017.710 et seq. of California Code of Civil Procedure.

Congratulations to . . .

. . . the San Diego Defense Lawyer members who were recently recognized by the San Diego Daily Transcript in "*The Daily Transcript is proud to present its Top Attorneys 2006*" article in the July 20, 2006 issue of the publication.

Those recognized are:

Corporate Litigation

Charles Grebing – Wingert Grebing Brubaker & Goodwin, LLP

Insurance

Robert W. Frank - Neil, Dymott, Frank, Harrison & McFall APLC

Clark Hudson - Neil, Dymott, Frank, Harrison & McFall APLC

Michael I. Neil - Neil, Dymott, Frank, Harrison & McFall APLC

Labor and Employment

Harvey Berger - Pope, Berger & Williams, LLP

Real Estate & Construction Litigation

Karen Holmes - Balestreri Pendleton & Potocki

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Dick Semerdjian - Schwartz Semerdjian Haile Ballard & Cauley LLP

Daniel White - White & Oliver, APC

Counsel would greatly benefit from becoming “partners” with their client’s IT personnel who will be involved in any future electronic discovery and, therefore, need to educate the IT personnel on their role in any legal process.

Pending Litigation

Once the client understands that litigation is pending (but that is another article), counsel should contact the client’s IT and record-management personnel regarding document preservation obligations.

Further, counsel must determine whether to send a preservation letter to opposing counsel or potential party in anticipation of requesting electronic discovery upon litigation. If sending such a letter, it should describe with specificity the desired preserved discovery, without limiting the kind of data requested kind of information, and the specific statute(s), or other legal authority supporting your request.

If such letter is considered, one must anticipate that you will receive one in kind. Therefore, be prepared to put opposing counsel on notice of your client’s plan for document preservation, and begin documenting details of the costs and efforts associated with preservation in the event of a cost-sharing or -shifting arrangement. If the matter will involve large volumes of data or documents, an outside company whose sole business is the storage and retrieving of documents and their data may be cost effective when involved from the start to scan and have the documents search readable. Further, inform your client that employee who work out of their residences may be required to preserve their hard drives (or other storage devices) if they have sent/receive company e-mail, or have direct-connect computing (Citrix, PC Anywhere, etc.) with the client’s mainframe and their work desk computer.

Further, a chain-of-custody log should be maintained to prove the integrity of the evidence. Such a log would include how the document or data was gathered, properly copied, transported, analyzed, preserved, and not been altered in any manner.

Litigation

Once litigation commences, if electronic discovery is anticipated to be of significant consequence, such issue should be quickly addressed with the court, usually at a Case Management Conference or ex parte applica-

tion if time is of the essence—particularly if counsel has knowledge that the opposing party has destruction deadlines and spoliation becomes a critical issue. A quick search of the Internet should reveal several examples of model orders relating to the preservation of electronic discovery.

A meet-and-confer with opposing counsel may also ease the burden of the “silent” party; the one who believes that, if it is not mentioned, it will never be brought up and therefore may have a belief of a strategic advantage. Such meet-and-confer should include preservation and production, procedures for dealing with the inadvertent disclosure, the necessity of restoration of deleted information, scope of discovery, media types, in-house and at-home systems of operations, and assignment of preservation costs.

Propounding electronic discovery requests early should involve learning of the opposing party’s infrastructure, IT systems, and preservation and back-up procedures, operating software, storage mediums and location, home computer use, and remote protocols. Once the above is known, further propounded discovery can be tailored. Requests that address custodians, formats, timeframes, and the key issues will typically stand up in court. In contrast, courts do not favor the “any and all” discovery demand.

If you are on the receiving end, consideration of seeking a protective order is warranted. In the alternative, a “quick peek” or “clawback” agreement might serve the parties and conserve resources. The “quick peek” approach to electronic discovery is one which data are turned over to the requesting party without review by the producing party; the requesting party then identifies the information it is interested in and the producing party will then conduct a privilege review. A “clawback” agreement typically allows the producing party to hand over documents without waiving any privilege claims, with the producing party retaining the right to specify that certain documents are privileged and to demand the other side return these documents or prove they have been destroyed. Further, the requesting party may not make use of any such privileged documents. Regardless of the agreement, at least one party will seek assurance that such an agreement is enforceable by seeking an order from the court.

Some Specifics

The most sought after electronic discovery propound is e-mail. Not for the contents, but for the Metadata it contains. Think Enron. Metadata, which literally means “data about data” are data that describe other data. The data are becoming more desirable because they carry information about the author, creation date, attachments, and the e-mail identification of all recipients (direct, “cc”, and “bcc”). As e-mails are received, and then forwarded to one or more recipients, the “conversations” are recorded and accumulate into a thread that becomes a historical record of events, to which the time table may be critical in proving or disproving elements of law.

Although e-mails are the “classic” example, Metadata are readily available in other file types such as documents. Some embedded data can reveal documents names, file same locations, authors, and editors. Retrieval of previous edits in the documents is possible and can reveal a progression from the original disclosure of an issue to the public statement release to the media days, weeks, or years later.

In any factual dispute—be it determining the date of a wrongful termination, the private use of a company’s intellectual property, or knew a person knew of a fact—metadata are a great resource.

In conclusion, several service companies exist that can be of further assistance in document storage, search, compilation, and retrieval. Without endorsement, some offer on-line demonstrations for further education and discussion. (See, peteroncsr.com, paulsonreporting.com, and thelegalsupportgroup.com.)



The Bottom Line

Case Title: Harbour Crossing, Ltd. V. Trango Systems, Inc.

Case Number: GIC830163

Judge: Honorable Joan M. Lewis

Plaintiff's Counsel: L.B. Chip Edleson, Esq. and Joann F. Rezzo, Esq. of Edleson & Rezzo

Defendant's Counsel: Harry W. Harrison, Esq. of Harrison Patterson & O'Connor, LLP

Type of Incident/Causes of Action: Business dispute/breach of contract; breach of covenant of good faith and fair dealing; unjust enrichment; fraud (punitive damages)

Settlement Demand: \$350,000 written demand in December 2005; \$225,000 oral demand before trial

Settlement Offer: \$0 (dismissal in exchange for a waiver of costs)

Trial Type: Jury

Trial Length: 6 trial days; 2 deliberation days

Verdict: Defense

Insurance Law



By: James M. Roth, The Roth Law Firm

Three recent decisions create an unblemished victory for the folks issuing the insurance policies.

UNDER INSURER'S DUTY TO DEFEND ANY SUIT OR ACTION, THE PHRASE "ANY SUIT OR ACTION" UNAMBIGUOUSLY

APPLIES TO PROCEEDINGS IN COURT AND DOES NOT ENCOMPASS ADMINISTRATIVE PROCEEDINGS THAT DO NOT INVOLVE A LAWSUIT. In *Lockheed Corp. v. Continental Ins. Co.* (2005)134 Cal. App.4th 187, the California Court of Appeal for the Sixth District affirmed and modified the trial court's entry of judgment for Lockheed Corporation's primary insurers on the ground there was no duty to defend "administrative proceedings" absent a lawsuit under policies that agreed to defend "any suit or action." The court also affirmed the trial court's rulings that Lockheed's policies were "accident-based," that the term "accident" included a sudden and unexpected temporal element, and that coverage is triggered when both the accident and damage occurs during the policy. Too, personal injury coverage did not apply to pollution related property damage, and Lockheed failed to make a prima facie case proving it sustained property damage caused by an accident over and above non-accidental pollution related property damage. Two components of the opinion are of interest. First, Lockheed contended the trial court erred when it ruled that if Lockheed contends pollution was caused by a sudden, unintended, and unexpected happening during the policy period, and other pollution resulted from gradual causes, it must prove a sudden, unintended and unexpected discharge caused an appreciable amount of contamination "over and above" the contamination caused otherwise. Lockheed argued applying the trial court's "over and above" requirement to policies not containing a pollution exclusion was error. The court disagreed, holding an insurer who contracts to cover pollution claims covers damage caused by pollution if the discharge is sudden and accidental. In a case where some damage has been caused by noncovered events, an insured must prove there is damage resulting from a covered event – damage over and above that which is not covered under the policy. Second, Lockheed unsuccessfully challenged the trial court's ruling [pursuant to *Cottle v. Superior Court* (1992) 3

Cal. App. 4th 1367 – a trial court may use its inherent powers to manage complex litigation by ordering the exclusion of evidence if the plaintiff is unable to establish a prima facie case prior to the start of trial] ordering the parties to produce pre-trial, sufficient evidence to make a prima facie showing for each issue upon which the party had the burden of proof at trial. The trial court ruled Lockheed's efforts to prove coverage for contamination at one of its contaminated sites, by submitting evidence of 14 accidents it claimed resulted in the release of pollutants, was insufficient as a matter of law and therefore excluded under *Cottle*. This opinion very literally applies the language of the policy.

INSURED WHO DEVELOPED CARPAL TUNNEL SYNDROME OVER TIME AS A RESULT OF ORDINARY WORK ACTIVITIES DID NOT SUFFER "ACCIDENTAL BODILY INJURY." In *Kimberly Gin v. Pennsylvania Life Ins. Co.* (2005)134 Cal. App.4th 939, the First District Court of Appeal affirmed the trial court's ruling granting Pennsylvania Life Insurance Company's motion for summary judgment holding that an injury resulting from the repetitive stress of typing did not constitute an "accidental bodily injury." In 1994, Kimberly Gin began working for United Parcel Service as a data entry clerk. In 1996, she purchased a disability insurance policy from Penn Life. The policy provided that Penn Life would pay a monthly disability benefit to Gin if she sustained an "accidental bodily injury" while the policy was in force. Shortly after Penn Life issued the policy, Gin filed a claim for disability benefits for injuries caused by the repetition of typing on a keyboard. Gin sued Penn Life after the insurer discontinued policy benefits. Penn Life moved for summary judgment, arguing Gin had no right to coverage because she did not suffer an "accidental bodily injury" as required by the policy. The trial court granted Penn Life's motion after it determined that Gin suffered from a "repetitive stress injury" which could not be considered accidental. The court of appeal affirmed, rejecting Gin's argument that an accident occurred because her disability was the unexpected, unforeseen consequence of a causative occurrence: her typing at work. The court of appeal found that Gin's interpretation of the term "accident" was too broad. So if repetitive stress injuries are not "acci-

dental,” my typing of this tome is not injurious to any of you.

THE WRONGFUL SOLICITATION OF CUSTOMERS IS NOT COVERED AS AN “ADVERTISING INJURY.” In *Hayward v. Centennial Ins. Co.* (9th Cir. 2005) 430 F.3d 989, the United States Court of Appeal for the Ninth Circuit applying California law affirmed summary judgment in favor of an insurer concluding the insurer did not owe a duty to defend an action alleging wrongful solicitation of customers, finding such allegations do not constitute “advertising injury” as required by the policy language. From 1996 to 1999, Hayward was employed by In Sync Media. During 1999, Hayward went to work for a competitor of In Sync’s. In 2000, In Sync filed a complaint asserting causes of action for breach of contract and breach of fiduciary duty against Hayward, and alleging misappropriation of trade secrets and violation of the Business and Professions Code against Hayward, his new employer, and others. The complaint alleged Hayward breached his obligation to In Sync by “speaking with and soliciting customers of In Sync. . . in connection with his plan to move over to the [the competitor] Andresen and [that Hayward] misappropriated trade secrets by obtaining a book of business of plaintiff’s customers” and “solicited customers or potential customers of . . . In Sync. . . for services to be performed by defendants.” Hayward tendered the complaint to Centennial. Centennial denied coverage and Hayward sued. The federal district court granted summary judgment in favor of Centennial relying on the California Supreme Court’s decision in *Hameid v. National Fire Insurance of Hartford* (2003) 71 P.3d 761. In *Hameid*, the Court found that the definition of “advertising injury” “require[d] widespread promotion to the public such that one-to-one solicitation of a few customers does not give rise to the insurer’s duty to defend the underlying suit” and that solicitation of customers from a customer list cannot constitute advertising injury within the meaning of the policy because it does not involve “widespread distribution of promotional materials to the public at large.” The Ninth Circuit affirmed the ruling for Centennial. It found that because In Sync’s complaint alleged Hayward agreed to bring confidential information including trade secrets, marketing plans, data and customer and supplier identities to Andresen and that he would solicit customers, or potential customers of In Sync for Andresen, the allegations did not fall within the definition of “advertising injury” in accordance with *Hameid*.

Written Complaint to School Board Held Protected Under Anti-SLAPP Law (*Lee v. Fick (2005) 35 Cal. App. 4th 89 (Review denied Feb. 2006)*)

By Kelly T. Boruszewski of Lorber, Greenfield & Polito, LLP

Michael Lee, a high school baseball coach, sued a parent for, among others, libel, and slander. These causes of action were based upon that parent publishing a letter to the Conejo Valley Unified School District claiming Lee was manipulative to the players, the parents, and the other coaches; verbally abusive to the kids; emotionally abusing the kids with his outbursts of anger and favoritism to certain players; and threw a fit in the dugout and verbally attacked the parent’s son for not respecting his authority. The slander case of action was based on the allegation that the parent stated to at least eight people Lee was a bad coach, was unethical, and had severe anger and emotional and anger problems. In both causes of action, Lee alleged the parents acted with malice and caused him to lose his job.

In response to the Complaint, the parent brought a special motion to strike (anti-SLAPP motion) pursuant to Section 425.16 of the Code Civil Procedure. Section 425.16, subdivision (b)(1) provides: “A cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” Subdivision (e)(1) provides that an act in furtherance of a person’s right of petition or free speech includes, “any written or oral statement . . . made before a . . . judicial proceeding, or any other official proceeding authorized by law . . .”

Section 425.16 requires a two-step analysis: First, determination whether defendants had made a threshold showing that the challenged causes of action arise from a protected activity. If so, then, second, whether the plaintiff has demonstrated a probability of prevailing on the claim, i.e., the complaint is sufficient and is supported by facts sufficient to sustain a judgment in plaintiff’s favor.

To that end, the parent filed a declaration stating Lee became angry as her son when the son “shook off” Lee’s baseball signs, to which Lee verbally and physically threatened the son, poking a finger in his chest. As a result, the parent wrote a letter addressed “To Whom It May Concern,” alleging libelous statements.

The libel cause of action arose from the letter the parent sent to the school board. Civil Code section 47, subdivision (b) provides that any publication made in any “judicial proceeding” or “in any other official proceeding authorized by law” is privileged. Thus, communications to an official agency intended to induce the agency to initiate action are part of an “official proceeding,” including complaints to school authorities about a teacher or principal in the performance of his or her official duties.

Lee submitted an affidavit in opposition to the motion. He declared the parent’s son was rude to the coaches and had a bad attitude, and denied that he physically or verbally abused the son. When Lee read the parent letter submitted to the school district, he could not believe what was alleged. School officials conducted a four-week investigation, and Lee continued as baseball coach for the next season. It was only after the parent then met with the principal of the school that Lee was terminated as head coach.

Lee argued the parents never intended to initiate any legally authorized proceedings because the letter was not addressed to a school official, but “To Whom It May Concern.” The Court held that the address on the letter is not determinative and the parent’s uncontradicted declaration that she wrote the letter to deliver to the school district and did not publish the letter to any other person.

Lee then argued that the letter did not request an investigation or hearing and did not ask for any action. But the Court held that it is obvious from the content of the letter the parents were requesting that Lee be removed as coach.

Continued on page 8

The Bottom Line

Case Title: Ruth Robles v. Hector Fabian Sanchez, et al.

Case Number: 146856

Judge: Honorable Hugh M. Flanagan, Merced County Superior Court

Plaintiff's Counsel: Robert Koenig, Esq.

Defendants' Counsel: Bob Tyson, Esq. and Mike Morales, Esq. of Tyson & Mendes LLP

Type of Incident/Causes of Action: Admitted liability wrongful death lawsuit arising out of a single vehicle accident resulting in the death of plaintiff's fifteen year old daughter and her eight and a half month old fetus. Defendant driver admitted to taking methamphetamine and alcohol, and stipulated to causation. The only issue before the jury was the value of the life of a 15 year old girl to her mother plaintiff.

Settlement Demand: Plaintiff reduced demand to \$60,000 in a CCP 998 Offer To Compromise prior to trial.

Settlement Offer: CCP 998 for insurance policy limits of \$15,000

Trial Type: Jury

Trial Length: 5 days

Verdict: The jury found the value of the 15 year old girl's life to her plaintiff mother was zero.

The jury specifically awarded damages as follows:

1. Punitive damages against driver, defendant Hector Sanchez: \$9,000
2. Economic Damages: \$4,800 (defense stipulated to these funeral and burial costs)
3. Noneconomic Damages:
 - a. Loss of past love, companionship, comfort, care, etc.: \$0
 - b. Loss of future love, companionship, comfort, care, etc: \$0

Written Complaint to School Board

Continued from page 7

The Court of Appeal held that complaints to school authorities about a teacher or principal in the performance of his or her official duties are privileged, pursuant to Section 47, subd. (d) of the Civil Code, holding that a letter written by a parent to school officials containing allegedly libelous statements about the coach was written to prompt official action and was privileged, even though the letter did not request an investigation or hearing and did not ask for any action. Further, the Court held that it was not required that the letter expressly request an investigation or hearing or that school officials take any particular action. Notwithstanding, it concluded that it was obvious from the content of the letter that the parent was requesting that the coach be fired.

Under Lee's slander cause of action, the Court held that the parent's alleged comments to school officials and other "interested" parents of baseball players discussing her concerns about Lee's conduct were privileged and Lee cannot avoid the privilege by characterizing the discussion among parents as gossip.

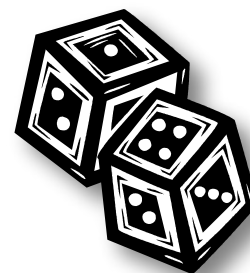
Lee last attempt was to claim that after school officials initially determined to retain him, the matter was no longer under consideration in any official proceeding. However, the Court held that the parent asked the school officials to reconsider, which is part of the official proceedings and is as privileged as an initial complaint.

The parent, as the prevailing party in the anti-SLAPP motion, was entitled to attorneys' fees.



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BACK TO BASICS: PROTECT YOUR CLIENT BY OBTAINING A DISMISSAL WITH PREJUDICE

By Rachael A. Campbell of Butz, Dunn, DeSantis & Bingham



A physician cannot be named in a complaint alleging professional liability and related claims for the same injury twice, right? Wrong! Tenacious plaintiff's counsel may attempt to relitigate the same cause of action against your physician client by dressing it in different clothing, i.e., formulating a "new" and "different" cause of action based on the purported discovery of "new" facts. If counsel did not obtain a dismissal with prejudice in the initial lawsuit, the physician client will not be

protected if the new action is within the statute of limitations set forth in Code of Civil Procedure section 340.5. The following hypothetical illustrates this point.

Hypothetical Case Study

Dr. X receives a call at his office from a nearby hospital that does not have a physician practicing in his specialty on staff. Dr. X is informed that a Code has been called, involving a patient who requires care and treatment from a physician in his specialty. Dr. X races to the hospital, arriving within minutes, only to find the patient has already expired and is unable to be revived.

A lawsuit is brought by the patient's family, who claim that the fraud and conspiracy of various defendants (including Dr. X) concealed the patient's true cause of death. Due in part to Dr. X's lack of involvement in the care and treatment of the patient, defense counsel negotiates a dismissal with prejudice as to Dr. X early in the course of the litigation. Within the statute of limitations period, the action is tried, but ends in a mistrial and the remaining defendants settle the claims against them.

Shortly thereafter, and purportedly within the statute of limitations pursuant to the discovery rule set forth in Code of Civil Procedure section 340.5, a new lawsuit is filed against Dr. X. The new lawsuit alleges novel theories of recovery and the discovery of "new" facts demonstrating fraud and negligent misrepresentation by Dr. X to conceal the cause of death of the patient.

Defense counsel demurs, arguing that plaintiff has already litigated the claim, since it arises from the same primary right, i.e., the right to discover the patient's cause of death. The vital importance of obtaining a dismissal with prejudice and significant increase in defense counsel's chances of having the demurrer sustained without leave to amend is revealed by a review of applicable principles of law.

Applicable Principles of Law

A dismissal with prejudice is a retraxit, barring subsequent suits on the same claim. (*Rice v. Crow* (2000) 81 Cal.App.4th 725, 733 [citations omitted].) A retraxit is the common law term for "an 'open and voluntary renunciation of the suit in open court.'" (*Id.*, supra, 81 Cal. App.4th at 733, citing *Ghiringhelli v. Riboni* (1950) 95 Cal.App.2d 503, 506.)

"A retraxit is a judgment on the merits preventing a subsequent action on the dismissed claim. It has 'always been deemed a judgment on the merits against the plaintiff, estopping him from subsequently

maintaining an action for the case renounced . . ." (*Rice*, supra, 81 Cal. App.4th at 734 [emphasis added].) "A dismissal with prejudice is a retraxit constituting a decision on the merits invoking the principles of *res judicata*." (*Id.*, citing *Torrey Pines Bank v. Superior Court* (1989) 216 Cal.App.3d 813, 822 [emphasis added].) The *res judicata* effect of a voluntary dismissal with prejudice does not depend upon consideration. (*Roybal v. University Ford* (1989) 207 Cal.App.3d 1080, 1086.)

The doctrine of *res judicata* precludes parties or their privies from relitigating a cause of action that has been finally determined by a court of competent jurisdiction, and is also known as "claim preclusion." (*Rice*, supra, at 734 citing *Vezina v. Continental Cas. Co.* (1977) 66 Cal.App.3d 665, 669.) Claim preclusion prevents relitigation of the same cause of action in a second suit between the same parties. (*Le Parc Community Assoc. v. Workers' Compensation Appeals Board* (2003) 110 Cal.App.4th 1161, 1169.)

California law defines a "cause of action" for purposes of *res judicata* by analyzing the primary right at stake: "A 'cause of action' is comprised of a 'primary right' of the plaintiff, a corresponding 'primary duty' of the defendant, and a wrongful act by the defendant constituting a breach of that duty." (*Le Parc*, supra, 110 Cal.App.4th at 1170.) "The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action." (*Id.*) "If two actions involve the same injury to the plaintiff and the same wrong by the defendant then the same primary right is at stake even if in the second suit the plaintiff pleads different theories of recovery, seeks different forms of relief and/or adds new facts supporting recovery." (*Id.* [citations omitted, emphasis added].)

"The scope of the primary right . . . depends on how the injury is defined. . . . An injury is defined in part by reference to the set of facts, or transaction, from which the injury arose." (*Federation of Hillside and Canyon Assoc. v. City of Los Angeles* (2004) 126 Cal.App.4th 1180, 1202.) Although California has rejected a "transactional approach [where injuries arising from the same set of facts only give rise to one cause of action] the courts have indicated that "in defining the injury suffered, a primary rights theory incorporates to some degree a transactional standard." (*Id.*, at 1203.)

Moreover, a plaintiff will be precluded from raising unknown facts in subsequent litigation if, "by exercising due diligence, he or she could have discovered the relevant information before filing the initial suit." (*Allied Fire Protection v. Diede Construction, Inc.* (2005) 127 Cal. App.4th 150, 157.) Therefore, defense counsel may successfully argue that where a plaintiff contends a fact was unknown due to defendant's fraud and attempts to file a second lawsuit based on that fact, the plaintiff is barred from the second suit if with diligence plaintiff could have discovered the fact and included it in the first lawsuit.

Conclusion

The foregoing principles demonstrate that, if as in the hypothetical case, defense counsel obtains a dismissal with prejudice and can demonstrate the second suit concerns the same primary right, the second lawsuit will be barred by the principle of *res judicata*. The moral of the story is, do not be tempted to accept a dismissal without prejudice!

The Bottom Line

Ruth Robles v. Hector Fabian Sanchez, et al. continued

The jury also apportioned fault as follows: Defendant Hector Sanchez (the driver): 45% liable Arturo Valencia, Jr. (deceased son of defendants): 45% liable Lorinda Robles (deceased daughter of plaintiff): 10% liable

The case subsequently settled for \$7,500.

To the jury, plaintiff's counsel argued "\$10 million was not enough" to compensate plaintiff for the loss of her fifteen year old daughter's life.

The defense argued it was time for closure and healing. Defense counsel asked the jury to place the value of past loss of comfort, society, solace, love, etc. as zero. Defense counsel also argued plaintiff's future loss of her fifteen year old daughter's love, companionship, comfort, care, etc. was zero. Finally, the defense asked for no punitive damages.

Case Title: Burks v. Hernandez

Case Number: GIC 846471

Judge: Honorable Frederic L. Link

Plaintiff's Counsel: Matthew B. Butler, Nicholas & Butler, LLP and Andrew A. Thompson, Brandon & Associates, APC

Defendant's Counsel: Lincoln Horton, Selman Breitman, LLP

Type of Incident/Causes of Action: Breach of Contract, Fraud, Negligence-Construction Defect

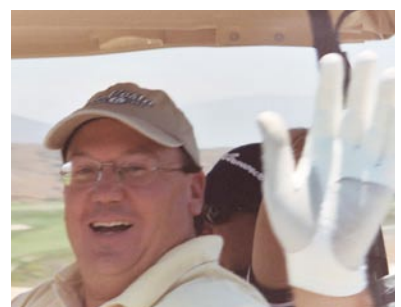
Settlement Demand: Plaintiff's 998 \$500,000

Settlement Offer: Defendant's 998 \$249,000

Trial Type: Jury

Trial Length: 7 Days

Verdict: Settled just before closing arguments for \$525,000.



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MOLD ALERT

Geffcken v. D'Andrea, et al.

2006 Cal. App. LEXIS 419 (2d Dist. March 28, 2006)

By: Lane Webb, Esq. and Alan E. Greenberg, Esq. Wilson, Elser, Moskowitz, Edelman & Dicker LLP

The mere presence of mold spores at a property is not a sufficient basis for expert testimony on

the medical effects of exposure to mold. Pervasive errors in the chain of custody of mold samples render scientific testimony based upon such samples inherently unreliable.

The California Court of Appeal, Second Appellate District, Division Six has certified for publication an important decision which may have significant impact on the conduct of mold litigation nationwide. In *Geffcken v. D'Andrea, et al.*, 137 Cal. App. 4th 1298 (2d Dist. 2006), a case in which Lane E. Webb, a partner in the San Diego office of Wilson Elser Moskowitz Edelman & Dicker LLP was lead trial counsel and co-appellate counsel, the Court held that the mere presence of mold spores at a property is not a sufficient basis for expert testimony on the medical effects of exposure to mold. Instead, plaintiffs are required to first establish the presence of mycotoxins. In addition, the Court held that pervasive errors in the chain of custody of mold samples render scientific testimony based upon such samples inherently unreliable.

In *Geffcken*, Eva Geffcken (Eva) and her son, Alexander Geffcken (Alexander), claimed that they were exposed to mold mycotoxins at their residence. Eva also claimed that she was exposed to mold mycotoxins at her place of work, Casa Dorinda, where she worked as a care giver for one of the residents. Respondents allegedly were responsible for the management, maintenance, or construction of the properties. A global demand of 6 million was made to settle the case.

Eva and Alexander maintained that the exposure caused them to suffer from various ailments, which in the case of Eva included lung cancer, neurological problems, respiratory problems, immune deficiency, fibromyalgia, infections on her tongue, toenails, and skin, chronic fatigue, weakness, memory loss and headaches, and in the case of Alexander included chronic fatigue, immune dysfunction, neurological problems, respiratory problems, reactive airway disease, elevated liver enzymes, and chemical hepatitis of the liver. Eva and Alexander's expert witness on the

medical effects of exposure to mold was Dr. Gary Ordog. Patrick Moffett was the Geffcken's mold sampling expert, but significantly he did not test for the presence of mycotoxins.

The trial court conducted a hearing under Evidence Code section 402 which lasted two weeks in Department 6 of the Santa Barbara Superior Court, the Honorable Denise deBellefeuille, presiding, on the joint motions in limine filed by Respondents. Those motions, which Mr. Webb took the lead in arguing on behalf of Respondents, were the following: (1) to exclude the testimony of Dr. Gary Ordog; (2) to exclude the environmental sampling data of Patrick Moffett; (3) to exclude the results of two medical tests: a mycotoxin antibody test and a blood serology test, and (4) to preclude Appellants from alleging exposure to mycotoxins at the properties in question. In addition to Dr. Ordog and Mr. Moffett, the court heard testimony from a Dr. Aristo Vojani as a proponent of one of the blood serology tests as well as from Respondents' experts, Daniel Baxter (mold sampling), Dr. Daniel Sudakin (medical toxicology), and Dr. Adrian Casillas (internal medicine, allergy and immunology). Following the hearing, the trial court granted Respondents' motions in limine and entered judgment in favor of Respondents. The Court of Appeal affirmed the judgment of the trial court. Mr. Webb and Alan E. Greenberg, also with the San Diego office of Wilson Elser Moskowitz Edelman & Dicker LLP and a member of the Board of Directors of SDDL, handled the appeal on behalf of Respondent Montecito Retirement Association dba Casa Dorinda.

The Geffcken Court first addressed the trial court's exclusion of Patrick Moffett's environmental sampling data. The Court noted that Mr. Moffett's data had little, if any, probative value because of the "pervasive chain of custody errors and deficiencies" noted by Daniel Baxter which invalidated the integrity of the sampling results. Moreover, the Court held that, in any event, the probative value of Moffett's data was minimal and properly excluded under California Evidence Code section 352 because at most it showed that mold spores, not mycotoxins, were present at Appellants' residence and at Casa Dorinda.

The Geffcken Court noted that the issue was not whether mold spores had been present at Appellants' residence and at Casa Dorinda. The issue was whether Appellants had been exposed to mycotoxins at these properties, and whether the mycotoxins had caused the various ailments from which they alleged suffered. The Court agreed with authoritative publications from the Environmental Protection Agency and the American College of Occupational and Departmental Medicine that the presence of mold in a building does not necessarily mean that mycotoxins are present. The Court also agreed with the testimony provided by Dr. Sudakin that no valid conclusion about mycotoxins as the cause of health effects can be derived from limited environmental testing data and that an attempt must be made to quantify exposure [to mycotoxins] and dose.

The Geffcken Court next addressed the issue of the trial court's exclusion of the Immunosciences Mycotoxin Antibody Test (Immunosciences Test) and the IBT Blood Serology Test (IBT Test). The Immunosciences Test purports to show the presence of antibodies produced by the presence of mycotoxins. The IBT test purports to show the presence of antibodies produced by the actual mold, rather than to mycotoxins. The blood serology test results were positive for both Appellants. The Court concluded, primarily based upon the testimony of Dr. Sudakin and Dr. Casillas, as well as a publication from the California Department of Health Services, that neither the Immunosciences Test nor the IBT Test had gained general acceptance in the relevant scientific community and therefore did not satisfy the Kelly-Frye test which is used in California. Unfortunately, in a footnote added by the Court at the time it certified the opinion for publication, the Court stated that under a different set of facts its holdings would not preclude a trial court from ruling that the required Kelly-Frye foundation had been met for the admission of the Immunosciences Test and the IBT Test. Nonetheless, the Geffcken opinion provides some support for the exclusion of the Immunosciences Test and IBT Test in other cases in the absence of any additional evidence than was presented at the 402 hearing or evidence that the tests have gained general acceptance in the relevant scientific community since the date of the opinion.

Since Mr. Moffett's environmental sampling data and the two blood serology tests were properly excluded from evidence by the trial court, and in the absence of any testing for
Continued on page 14

Planning Ahead

August 2006

3rd - Tisha B'Av

September 2006

4th - Labor Day

23rd - Rosh Hashana

24th - Ramadan begins

October 2006

2nd - Yom Kippur

7th - First day of Sukkot

9th - Columbus Day

9th - Leif Erikson Day

13th - Last day of Sukkot

14th - Shmini Atzeret/Simchat

19th - Lailat Ul Qadr

24th - Eid-al-Fitr

29th - Daylight Saving Time ends

31st - Halloween

Mold Alert

Continued from page 13

mycotoxins at the properties in question, the Court held that the trial court was correct in precluding Appellants from alleging exposure to mycotoxins at the properties.

Finally, with respect to Dr. Ordog, the Court did not need to address the significant evidence presented at the 402 hearing concerning the questionable nature of Dr. Ordog's credentials or whether he properly qualified as an expert on the subject of adverse health effects caused by exposure to mycotoxins. Instead, the Court held that the trial court did not abuse its discretion under California Evidence Code section 801(b) in impliedly finding that there was no reasonable basis for his opinion that the exposure to mycotoxins had caused Appellants' ailments. In view of the absence of any reliable evidence that Appellants had been exposed to mycotoxins at the properties in question, Dr. Ordog's opinions were "speculative and conjectural."

This alert is for general guidance only and does not contain definitive legal advice.

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MALICIOUS PROSECUTION

- Counsel's Letters and Phone Calls Protesting Client's Absence of Liability Are Insufficient to Establish Lack of Probable Cause

By Darin L. Wessel, Maxie Rheinheimer Stephens & Vrevich, LLP

Every attorney at some point in his or her career will either write a letter about their client's absence of liability or receive one from opposing counsel. But, can such a letter establish a subsequent claim for malicious prosecution. The recently published case of *Marijanovic v. Gray York & Duffy* (2006) 137 Cal. App.4th 1262 established letters and phone calls from counsel protesting his client's absence of liability did not support his client's later suit for malicious prosecution.

Marijanovic involved a claim for malicious prosecution arising out of a prior construction defect case. But its lesson is applicable to all types of cases.

The Underlying Case.

Ante *Marijanovic* was the painting subcontractor on the Oakridge condominium complex built by R.C. Sehnert. Nine years after completion of construction, the Oakridge Condominium Association sued Sehnert for alleged latent defects. Maxie Rheinheimer Stephens & Vrevich initially represented Sehnert. Gray, York & Duffy later associated in as co-counsel. MRSV cross-complained on Sehnert's behalf against various subcontractors for express and implied indemnity. GY&D ultimately added *Marijanovic* as a cross-defendant based on the Association's claims of latent defects in the "water-exposed exterior surfaces..."

Marijanovic's attorney answered Sehnert's cross-complaint. Counsel then sent a letter to GY&D, which stated, "I have reviewed the defect report, and there is absolutely no basis to maintain this lawsuit against [Painter]. The only reference to painting is a reference to chipped paint on the wood trim. As you know, the paint was applied eleven years prior to the report. Paint is not expected to last that long; wood is normally repainted every five years. Thus, this is no reason to subject my client to the expense of this litigation. [Painter] does not have insurance coverage for this claim. As a result, this lawsuit is a hardship. We respectfully request that you voluntarily dismiss [Painter]." (*Marijanovic*, supra, 137 Cal.App.4th at p. 1266.)

Sehnert's counsel GY&D responded with a letter stating the site inspections and Association's expert presentation "made it clear that [Association] is claiming serious problems with the exterior finishes at this project. Certainly there are other parties who bear potential liability as well as your client. Additionally, lack of maintenance and upkeep are valid defenses for all of us." The letter continued, "[Association] alleges that, in connection with the horizontal siding, there was no painting or sealing of cut edges, and no back priming. Wood trim and privacy fences were likewise not back primed." (Id., 137 Cal.App.4th at p. 1267.) The letter concluded that based on the allegations, counsel was not in a position to dismiss *Marijanovic*.

The exchange of letters was followed by phone calls from *Marijanovic's* counsel to GY&D complaining that *Marijanovic* only painted exposed surfaces and was not responsible for any waterproofing or back priming. (Id., 137 Cal.App.4th at p. 1268.) However, counsel never produced *Marijanovic's* subcontract or a declaration from *Marijanovic* attesting to these assertions.

Ultimately, Sehnert was able to settle the Association's claims as part of a global settlement without contribution from *Marijanovic*. As a result of the settlement, Sehnert dismissed its entire cross-complaint with prejudice. *Marijanovic's* malicious prosecution case followed. (Ibid.)

The Malicious Prosecution Case.

Marijanovic asserted claims of malicious prosecution in the initiation and continued prosecution of Sehnert's cross-complaint in the Oakridge case. *Marijanovic* served MRSV first. MRSV responded with an anti-SLAPP motion. The motion argued *Marijanovic's* own complaint established probable cause for Sehnert's prior cross-complaint. *Marijanovic's* opposed based on his counsel's declaration attesting to counsel's letters and phone calls in the underlying case regarding his client's absence of responsibility establish an absence of probable cause for continued prosecution of the cross-complaint. The trial court granted this anti-SLAPP motion. (Ibid.)

Undeterred, Marijanovic then served GY&D with the malicious prosecution complaint. GY&D filed its anti-SLAPP motion on the same grounds as raised by MRSV. This time, however, Marijanovic supported his opposition with his own declaration stating his scope of work did not include waterproofing or back-priming, as well as his counsel's declaration attesting to the letters and phone calls protesting Marijanovic's innocence. This time, the trial court denied the anti-SLAPP motion on grounds Marijanovic established a prima facie case that continued prosecution of the cross-complaint lacked probable cause. GY&D appealed. (Id., 137 Cal.App.4th at p. 1269.)

Marijanovic then served Sehnert with his malicious prosecution case. MRSV responded on Sehnert's behalf with an anti-SLAPP motion. The trial court denied this motion stating it would not reconsider the findings it made in denial of GY&D's motion. (Ibid.)

The Court of Appeal Reverses.

On appeal, the appellate court reversed, concluding letters and phone calls from counsel during the underlying case asserting his client's absence of liability were insufficient to establish a lack of probable cause. (Id., 137 Cal.App.4th at p. 1271-72.) In reaching this conclusion, the Court of Appeal relied

on the California Supreme Court's statement in *Zamos v. Stroud* (2004) 32 Cal.4th 958, 970, fn. 9, which said, "Counsel who receives interrogatory answers appearing to present a complete defense might act reasonably by going forward with the defendant's deposition in light of the possibility that the defense will, on testimonial examination, prove less than solid. The reasonableness of counsel's persistence is, of course, a question of law to be decided on a case by case basis...." The appellate court noted in the present case, "there was no signed declaration from Painter presented ... while the [underlying] action was pending," indeed "[t]here was, in fact, no evidence of the limited scope of Painter's work beyond Painter's counsel's bald assertion that it was limited." (Ibid.) In comparison, Sehnert and its counsel were faced with Association's complaint which alleged "a 'fail[ure]' of 'water-exposed exterior surfaces,' and a defect report from their expert which attributed a certain percentage of fault for these failures to the painter of those surfaces." (Id., 137 Cal.App.4th at p. 1272.) The Court of Appeal concluded there was probable cause as a matter of law for Sehnert and its counsel to initiate and maintain the indemnity cross-complaint.

The Lesson.

Marijanovic tells counsel that letters and phone calls protesting their client's absence of liability, standing alone, is insufficient to establish a lack of probable cause. Indeed, the Marijanovic Court noted "it could well constitute malpractice for an attorney to drop a lawsuit for which supporting evidence existed, merely because opposing counsel asserted the action was baseless." (Id., 137 Cal.App.4th at p. 1272, fn. 5.)

Counsel who believes there is a complete absence of liability on the part of their client needs to support the assertion with evidence in the underlying case to opposing counsel. And, they need to realize that opposing counsel's action to test such evidence may still constitute probable cause as part of maintaining the underlying lawsuit. Marijanovic's counsel did not do this. Now, his client is exposed to an award of fees and costs under the anti-SLAPP statute. (Code Civ. Proc., §425.16, subd. (c).)

Darin L. Wessel, is a partner with Maxie Rheinheimer Stephens & Vrevich, LLP in its Pasadena office. He is a Certified Appellate Law Specialist, certified by the State Bar of California Board of Legal Specialization. He handled the appeal in this case on behalf of R.C. Sehnert.

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"They Say He Parted Well and Paid His Score":¹

Examining Junior Attorney Attrition & Retention

by Ben Howard of Neil, Dymott, Frank, Harrison, & McFall APLC²



The May 2006 ABA Journal article "The Great Divide," which discusses the attrition of young associates, is a recent example of the ongoing efforts to address junior attorney retention. This

hot-button topic is important to law firms for two reasons. The first reason is the high rate of attrition. A recent National Association for Law Placement (NALP) study found one in four associates leave within their first two years with a firm, and reported the number of departing attorneys jumps to 43% after three years.³

The second reason is the high cost of losing an associate. There are many estimates concerning the economic cost of a departed associate from major markets, where attorney's salaries are highest. In a smaller market such as San Diego, a better estimate can be derived from an internal study conducted by the U.S.-branch of the international accounting firm Deloitte & Touche, whose organizational and billing practices are analogous to a law firm's. The study found when a professional employee quits, a firm loses approximately 150% of the person's annual salary.⁴

Thus, the frequency junior attorneys leave law firms, coupled with the cost of each departed associate, affect each firm's profitability. By expending a firm's resources recruiting and training a new associate, each new attorney becomes an investment. Considering the average large law firm doesn't start recouping its investment in an associate until about midway through an associate's fourth year,⁵ the cost of a lost associate becomes even greater.

This article will address the retention issue by identifying a major cause of attorney attrition, explain why higher salaries aren't a solution, and make three recommendations law firms can implement to increase job satisfaction (and by extension retention). The purpose of this article is not to rehash the reasons junior attorneys leave firms. However, if poor retention is a symptom, we must address the cause before we can recommend a cure. When looking for attrition's cause, one recurring theme presents itself: an attorney's lack of discretionary time.

Attorney's billable hour requirements and inflexible work schedules are a large cause of attorney turnover. In an American Management Association Survey of 352 companies, employers found more success in retaining employees by "giving them a life" than by offering more compensation.⁶ Further, another study by Harris Interactive and the Radcliffe Public Policy Center found just over seventy percent of men in their twenties and thirties would be willing to take lower salaries in exchange for more family time.⁷

There is a lot of evidence supporting reducing hours leads to increased job satisfaction. Younger associates "have really bought into this work-life balance phenomenon that is pervading all industries," says Reston, VA attorney Karen McWilliams.⁸ "We were losing lawyers not to other firms, but to other schedules," said Michael Nannes, a Deputy managing partner at Dickstein, Shapiro, Morin & Oshinsky.⁹ As a further endorsement discretionary time matters most to attorneys, one study found a negative correlation between the number of annual hours worked and job satisfaction. "Of course, practitioners in large private practices get to console themselves for having a less satisfying job by having a more satisfying income," said the study's two authors.¹⁰

Law firms continue to increase salaries in an effort to entice and retain associates, but its not working. If an associate is primarily motivated by salary, it should come as no surprise the same associate will switch jobs to pursue more compensation. In some instances, high salaries can increase attrition, creating financial independence in an employee and allowing him or her flexibility to explore other pursuits.¹¹ According to the ABA Journal, younger associates may be "pocketing the financial rewards and grabbing the practical experience with little thought of investing in the long haul."¹²

High-earning lawyers in large private practices report the lowest average job satisfaction, while lower-earning attorneys (in all types of practice) report higher average job satisfaction.¹³ If one assumes higher job satisfaction correlates to higher retention, this study shows high salaries do not necessarily result in high retention.¹⁴

Recommendations

According to the research, the obvious solution to increase junior associate retention is to reduce associate hours. This is realistic only up to a certain point. What if a law firm cannot reduce its associate's hours? Law firms seeking to increase retention have started taking cues from a sector of law unaffected by both attrition and increasing salaries: non-profit organizations.¹⁵ Current trends indicate younger attorneys feel more affinity to their work than their work place. If an attorney cannot work less, or choose what they work on, perhaps how the attorney works might increase job satisfaction.

Fortunately, recommendations and practices making an attorney's work more meaningful are already in place. Ms. Susan Lambreth of Hildebrandt International addressed the problem of law firm attrition in 2001 in her article "Redressing Attrition: Retain More Associates by Taking a New Approach to Training and Development."¹⁶ In her commentary, Ms. Lambreth identifies at least eight practices law firms can implement to increase attorney retention. Three of those practices are summarized here.

1. Informal Training

Many law firms already engage in what Hildebrandt International dubs "formal legal training," or activities such as in-house programs or external CLE courses.¹⁷ What law firms historically do not pursue are opportunities for informal legal training. For example, after a drafted motion, deposition, or oral argument, a senior attorney can conduct an "after action review" with the junior associate involved to assist the associate in learning the processes involved in the just-finished work. Although this type of training is very time-consuming, Ms. Lambreth reports this type of training is most valuable to junior attorneys.

2. Training Checklists

Ms. Lambreth also recommends law firms maintain training checklists, or documents outlining the "exposures and experiences desired in a second-year, fourth-year, and sixth-year associate."¹⁸ Examples include what types of documents the associate needs experience in drafting, the types of hearings, meetings, or depositions the associate should have attended, as well as other similar, quantifiable benchmarks. These checklists, if incorporating different skill sets, can help each associate become more professionally balanced and well-rounded. These checklists can also help law firms prevent associates with similar ten-

ure having grossly different levels of ability. Last, these checklists can be especially helpful for performance evaluation purposes, both to the employer and employee, as qualitative measures of accomplishment.

3. Professional Development Plans

Whereas checklists are used to improve an associate's skill set, "Professional Development Plans" (PDP) are used to enhance the morale, career satisfaction, and productivity of associates.¹⁹ A PDP maps out one-year and three-year goals and objectives for an associate. Unlike checklists, which are used with associate year groups, plans are tailored to the individual. PDPs can include, but are not limited to: involvement on a firm committee, charitable or pro bono activities, writing articles or giving speeches, or development of a specialization and building credibility in that area. Just like the checklist, PDPs can be incorporated into performance evaluations.

These suggestions are just a few of many, and can be modified to fit the needs of individual firms. Hopefully an understanding of why junior attorneys leave law firms, together with the knowledge of what does and does not motivate young associates, will assist those seeking to increase attorney retention in their firm.

footnotes

- ¹ Shakespeare, William. *Macbeth*. Act V, Scene viii.
- ² Neil, Dymott, Frank, Harrison, & McFall APLC specializes in civil litigation and trial practices.
- ³ Willams, Joan & Calvert, Cynthia Thomas. "Don't Go! We Can Change." *Legal Times*, February 5, 2001. Hereinafter Williams & Thomas.
- ⁴ Chanow, Linda Bray. "The Business Case For Reduced Hours." *The Project for Attorney Retention*. See <http://www.pardc.org/>, last visited on May 19, 2006. Hereinafter Chanow.
- ⁵ Jones, Ashby. "The Third year Dilemma: Why Law Firms Lose Associates." *The Wall Street Journal Online*. Jan. 4, 2006, citing a study released in 2003 by Altman Weil, Inc.
- ⁶ Williams and Thomas, citing *The Wall Street Journal*, Sept. 22, 1999.
- ⁷ Williams and Thomas, citing *The Washington Post*, May 3, 2000.
- ⁸ Chanen, p. 48.
- ⁹ Chanow, p. 1.
- ¹⁰ "The Fruits of Our Labors: Dau-Schmidt Studies Lawyer Income and Job Satisfaction." *Ind. Univ. School of Law – Bloomington, Bill of Particulars*, Winter 2001. Hereinafter Dau-Schmidt.
- ¹¹ Chanen, p. 45.
- ¹² Williams and Thomas citing *The ABA Journal*, June, 1999.
- ¹³ Dau-Schmidt, p. 1.
- ¹⁴ However, this study (and others like it) deal with high(er) salaries, presumably from larger markets. The results may not be applicable in a smaller legal market such as San Diego.
- ¹⁵ Hedaa, Maryann G. and Douglas, Charles. "Retention Lessons – Meaning, Not Money Alone Matters." *Hildebrandt International Publications/Press Room*, May 1, 2000. See http://www.hildebrandt.com/Documents.aspx?Doc_ID=644, last visited on May 19, 2006.
- ¹⁶ Lambreth, Susan R. "Redressing Attrition." *Hildebrandt International Publications/Press Room*, April 2, 2001. See http://www.hildebrandt.com/Documents.aspx?Doc_ID=642, last visited on May 19, 2006.
- ¹⁷ *Id.*
- ¹⁸ *Id.*
- ¹⁹ *Id.*

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

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16th Annual Mock Trial Competition

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(Thursday, Friday and Saturday)

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This competition showcases terrific advocacy talent
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An invitation to judge
will be sent to all members.

However, please mark your calendar
and let us know now
if you are able to participate.



Sandee Rugg, Executive Director

srugg@waltonbiz.com or 619-405-8408

EXTRA!!! Member News EXTRA!!!

Members in the News

BALESTRERI, PENDLETON & POTOCKI have moved their offices to: Wells Fargo Plaza, 401 B Street, Suite 1470, San Diego, CA 92101, 619-686-1930 Phone, 619-497-1052 Fax, website: www.bpplawcorp.com

TYSON & MENDES has hired Greg Lusitana, Paloma Ramirez, and Jennifer Morgan Ford as associates.



SHEWRY & VAN DYKE announce Kellie Thompson (pictured, left top), Eydith Kaufman and Shawn Monroe (pictured, left bottom) have joined the firm as associates.

LAW OFFICES OF KENNETH N. GREENFIELD announce Sara T. Skocilich has joined the firm as an associate. Sara received her J.D. from The University of San Diego. She is practicing in bad faith litigation and insurance coverage.



HUGHES & NUNN, LLP has moved to: 401 "B" Street, Suite 1250, San Diego, CA 92101, Phone: (619) 231-1661, Fax: (619) 236-9271, www.hughesnunn.com

JAMPOL ZIMET SKANE & WILCOX LLP announces Julie Dupre and Austin Ching have joined the firm as associates.

Julie received her B.A. (1992) in English from the University of California, Los Angeles. She attended California Western School of Law (J.D., 1994) and served on the California Western Law Review/International Journal as both a Staff Writer and Editor. Julie was admitted to the State Bar of California in 1995 and is a member of the San Diego County Bar Association. She specializes in insurance defense litigation, including personal injury, premises liability, construction defect and insurance bad faith.

Austin received his B.S. in Psychology from Santa Clara University in 1998. He graduated from the University of San Diego School of Law in 2004, where he earned the highest grade in the class of Civil Procedure and was a member of Pi Beta Phi. He also received the award for Best Appellate Brief in his first year Law Skills Class. Prior to attending Law School, Austin worked as a Technology Public Relations Account Executive.

WHITE & OLIVER, APC announce Mina Miserlis and Janine Menhennet have joined the firm as associates.



Mina was born in San Diego, California, February 18, 1972, and was admitted to the California Bar in January 1998. Ms. Miserlis was admitted to the United States District Court (Southern District of California) in 2001. She was educated at the University of California, Berkeley (B.A., 1994, Summa Cum Laude, Phi Beta Kappa) and Loyola Law School, Los Angeles (J.D., 1997). Ms. Miserlis is a member of the San Diego County Bar Association, the Barrister's Club, the San Diego Defense Lawyers Association and the Association of Business Trial Lawyers.



Janine was born in San Francisco, California, on October 6, 1966. She was admitted to the California Bar in 1992, as well as to the United States District Court (Central District of California), and the Ninth Circuit Court of Appeals. She was educated at the University of California, Berkeley (B.A., Psychology, 1988), and Loyola Law School of Los Angeles (J.D., 1992). While in law school, Ms. Menhennet was a member of the Loyola of Los Angeles Entertainment Law Review. She has published articles on marital assets and employment law. Ms. Menhennet is a member of the California State Bar and the San Diego County Bar Association.

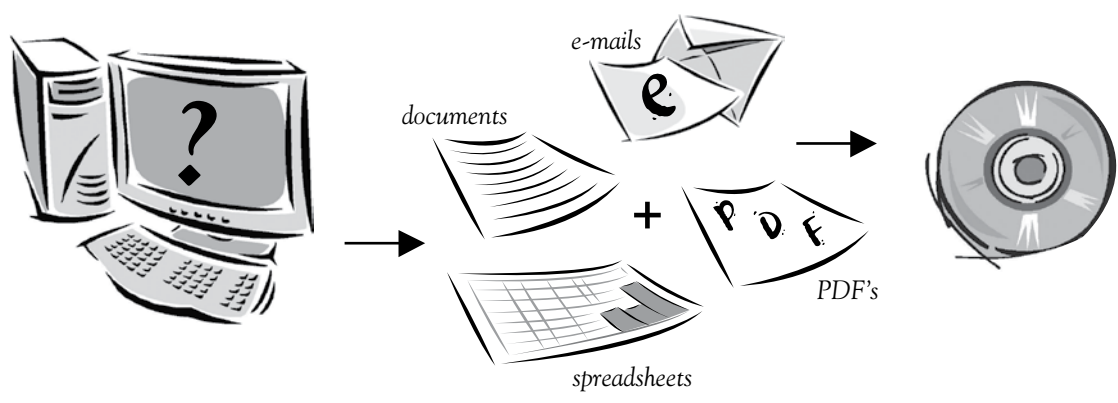


Harry W. Harrison, James R. Patterson and Matthew J. O'Connor are pleased to announce the formation of **HARRISON PATTERSON & O'CONNOR LLP**, a civil litigation and criminal defense law firm. The firm's contact information is: Harrison Patterson & O'Connor LLP, 402 West Broadway, Ste. 1905, San Diego, CA 92101, Tel: (619) 756-6990 / Fax: (619) 756-6991. Please visit us at www.hpplaw.com.

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