

THE UPDATE



**SAN DIEGO
DEFENSE LAWYERS**

FALL 2008

In this Issue

President's Message	2	Golf Tournament: Second Time Charm!	10
The Bottom Line	2	Employment Law Update	12
Thank You To Our Golf Sponsors!	3	Member News	13
Jurors Who Scare Both Sides	4	Summer Splash 2008!	16
Brown Bag Program- September	6	Edifications	17
Did You Know?	7	SDDL Member List	18
A Word From Lou On Jury Selection	8		

THE BOTTOM LINE

Case Title: William Grubb, by and through his guardian ad litem, Laura Bayonas v. Michael Levy, M.D. and Kevin Yoo, M.D.

Case Number: BC355633 (Los Angeles)

Judge: Honorable Aurelio Munoz

Plaintiff's Counsel: Lon B. Isaacson, Esq. and Larry Johnson, Esq., ISAACSON ASSOCIATES

Defendant's Counsel: Daniel S. Belsky, Esq. and Michelle E. Lopez, Esq., Belsky & Associates for Dr. Levy; Richard D. Carroll, Esq. and Lisa Iulianelli, Esq., Carroll, Kelly, Trotter, Franzen & McKenna for Dr. Yoo

Type of Incident/Causes of Action: Medical-Malpractice/Brain-Surgery

Settlement Demand: Plaintiff demanded \$6,000,000 before trial

Settlement Offer: Dr. Levy made a pre-trial CCP § 998 offer for zero dollars and a waiver of costs

Trial Type: Jury

Trial Length: 22 days

Verdict: Defense

Case Title: Rebecca Michael v. Braille Institute of America, Inc.; Philip L. Whiteman; Penny Miller; et al.

Case Number: INC042662

Judge: Honorable Philip J. Argento

Plaintiff's Counsel: Kristine P. Nesthus, Esq., Bankhead Nestus & Howard, LLP

Defendant's Counsel: Ray J. Artiano, Esq., and Lesa Wilson, Esq., Stutz Artiano Shinoff & Holtz

Type of Incident/Causes of Action: (1) discrimination/failure to accommodate; (2) harassment/hostile work environment; (3) retaliation; (4) failure to prevent/remedy; (5) violations of the California Family Rights Act; (6) intentional infliction of emotional distress; (7) negligent supervision; (8) violations of unfair competition law

Settlement Demand: None

Settlement Offer: None

Trial Type: Jury

Trial Length: 2 weeks

Verdict: Special verdict for Defendants on all causes of action

PRESIDENT'S MESSAGE



Civility. The legal community has been talking about it for years. But why? Because the battles we fight during the course of civil litigation can sometimes bring out the worst in not only our clients, but in us as well. The legal community's call for Civility is a hope to reign-in the emotions of that fight.

Why did you become a lawyer in the first place? To step-stone to something else? To make more money? To prove to yourself that you could? To please your parents? To feed your ego? To compensate for your shortfalls? To be powerful? If these were truly your only reasons, and no other, you may have a difficult time with the concept of Civility. But, if your reason was a desire to serve Justice in America, or to solve the problems of people or, as a defense lawyer, to defend the behavior of people, then Civility should be an easier concept for you.

When we are truly civil to opposing counsel, we end up doing and obtaining justice quicker and easier. We get more favors both in discovery and at trial when we are willing to give favors. When we are agreeable and willing to stipulate to those things that are truly not worth fighting about, the other side is encouraged to have a similar willingness. Being respectful of your adversary, honoring our system of justice, always being a man/woman of your word, and keeping your objectivity alive has its benefits.

You'll find the result of your own Civil behavior in court. The Judge will like you. The Courtroom personnel will like you. The jury will like you. The opposing party may even like you! (Think about how much easier cross-examination of the opposing party might be and what effect that might have on the jury's final decision!)

The truth of the matter is that Civility breeds lots of good things. You'll win more often, have more clients, make more money, be powerful, feed your ego, please your parents and compensate for your shortfalls. WHAT?! Greenfield, didn't you just say that those things are bad motivators for the practice of law? No. I said sole motivators. Those things have their place too. But only as long as you have as your primary goal - - the interests of justice and the defense of human beings.

Enclosed in this issue of The Update you will find fellow SDDL member and SDCBA President, Heather Rosing's and the SDCBA's new pamphlet on the Attorney Code of Conduct. It supports what we've been trying to do in this town for years. Read it, follow it, re-read it, keep it on your desk, and then re-read it. In the heat of battle we sometimes forget about Civility. And we shouldn't.

Thank you for your continuing support of our fine Organization. And thank you for the Civility, Integrity, and Balance you continue to demonstrate to the legal community everywhere!

MEMBERSHIP RENEWALS - - 2009

On November 1, 2008, SDDL will be sending membership renewal invoices to the Membership. This will give Members enough time before January 1 to renew and take full advantage of the tax benefit for the year 2008. Be on the lookout for your renewal notice and contact Membership Chair, Brian Rawers, for further information. Brian's e-mail address is Rawers@lbbbslaw.com.

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And a Special Thanks to our auctioneer, Dino Buzunis!

THE BOTTOM LINE

Case Title: Joseph P. Doherty v. Christian D. Bentley, M.D. and Primary Care Associates Medical Group, Inc.

Case Number: GIN 047357

Judge: Honorable Thomas P. Nugent

Plaintiff's Counsel: David K. Dorenfeld, Esq. and Rodger S. Greiner, Esq., Snyder Dorenfeld LLP

Defendants' Counsel: Daniel S. Belsky, Esq., Belsky & Associates

Type of Incident/Causes of Action: Medical Malpractice/Orthopedic Surgery/Post Operative Infection

Settlement Demand: Plaintiff demanded \$485,000 by way of a CCP § 998 offer

Settlement Offer: Defendants served CCP § 998 Offers for zero dollars and a waiver of costs

Trial Type: Jury

Trial Length: 6 days

Verdict: Defense

Case Title: Garcia v. San Diego Trolley, Inc.

Case Number: 37-2007-0007446

Judge: Honorable Ronald L. Styn

Plaintiff's Counsel: Ray Ryan, Esq. and David T. Achord, Esq. San Diego Injury Law Center

Defendant's Counsel: Julie Morris Soden, Esq., Law Office of Julie Morris Soden, A Professional Corporation

Type of Incident/Causes of Action: Plaintiff claimed trolley door closed on her body twice as she attempted to exit, resulting in personal injuries. Causes of action for dangerous condition of public property and common carrier negligence.

Settlement Demand: \$100,000 at mediation, dropped to \$50,000. Plaintiff served a CCP § 998 offer for \$12,999.00 prior to trial

Settlement Offer: \$1,500.00 plus a one year bus/trolley pass (value of \$768)

Trial Type: Bench trial

Trial Length: 2 ½ days

Verdict: Defense

Jurors Who Scare Both Sides

By Harry Plotkin

Whether or not you're relying on a jury consultant, every attorney should go into the jury selection with an understanding of juror profiles that will be receptive to your case.

Your first order of business in voir dire should be to weed out obvious bias by encouraging jurors to voice their immediate suspicions and concerns about your case. Next, highlight facts about your case that some jurors might find troubling, and encourage these jurors to admit difficulty staying fair and following the jury instructions. Spend some time rehabilitating those jurors who will likely be receptive to your case encouraging them to be fair so that opposing counsel won't be able to successfully challenge them for cause. If you have some issues that may be particularly troubling, ask some voir dire questions designed to convince jurors that they would have handled a similar situation closer to your client than they might otherwise admit (a psychological process called "normalization").

At this point, jury selection would be relatively simple—you've uncovered your worst nightmares, identified your most obviously receptive jurors, and hopefully made your panel more receptive to your case. But you shouldn't be done yet, not until you've asked some voir dire questions designed to clue you into your jurors' subtler predispositions. This is where jury selection becomes more challenging.

Voir dire is the time to ask questions that will assist you in making educated peremptory challenges in jury selection. During this time, you should be uncovering those experiences, attitudes, and values that the jurors themselves

are cognitively unaware will ultimately shape how receptive they will be to your case.

Because the jurors don't yet know the facts, the strengths, and the weaknesses of your case, most are completely unaware of which side their values make them more likely to favor. For example, an incredibly diligent, pro-active juror who goes to the doctor for health check-ups every three months, reviews her financial investments daily, and does a ten-point safety inspection on her car every morning before she drives to work doesn't know likely she is to dismiss a plaintiff who failed to do any due diligence. It should be your practice to know how each juror's unique makeup may influence their ultimate verdict, based on your case's comparative strengths and weaknesses.

My message is not to give more advice on ways to judge your jurors. Instead, my message is to encourage you to develop sound profiles and stick to your guns during jury selection. Too often, I see attorneys scared off by the outspoken jurors on the pane, even when those loud jurors express values that make them receptive to one's case. Loud, opinionate potential jurors scare the daylights out of attorneys—usually both sides—and intimidate lawyers into wasting peremptory strikes that might be better used on the silent killers on the panel.

Potential jurors who claim to be biased are no more biased than the other jurors on the panel, and peremptory strikes are routinely wasted on these jurors when the judge or opposing counsel rehabilitates them into promising to be fair. In reality, all jurors are biased in some way, whether they knowingly admit

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it or are blissfully unaware. The jurors who claim to be biased in voir dire are either trying to get off jury duty or (here's the irony) are the most honest and self-aware jurors on your panel, and probably more likely to be objective than the rest.

Don't jump to conclusions; jurors aren't jury consultants, nor are they reliable when it comes to predicting their own biases or

verdicts. In fact, most jurors are completely unaware of why they make decisions in trial, although they usually think they know. To rewrite a famous phrase, talking about juror bias is like dancing about architecture, which is to say that most jurors have no idea what may bias them or where their biases will lead them in a trial they have not seen yet.

Instead of taking the bait and wasting

peremptory challenges on the loud and the allegedly-biased, focus on the underlying values and attitudes that will make each juror receptive or hostile to your case, and never lose sight of the fact that, in voir dire, jurors don't know what your case is about. Just because a juror complains loudly about the worker's compensation system and lazy employees doesn't mean the juror will be unreceptive to a plaintiff's case, especially if the plaintiff comes across as honest, hard-working, and genuinely interested in trying to work through a disabling injury.

Instead of automatically striking your loudest jurors, spend more time on them in voir dire. An outspoken juror will undoubtedly be more influential to other jurors, so take the time to figure out if the juror will be your worst nightmare or your strongest advocate. If you determine that the outspoken juror may be hostile to your case after all, don't stop asking him/her questions. The more an outspoken juror says, the more likely your opposing counsel is sweating bullets and worrying about what that juror may do. More likely than not, opposing counsel will probably use a peremptory challenge on that juror anyway.

Just the opposite are the smiling, friendly jurors and the smart, reasonably-sounding jurors on the panel. No matter what these jurors say, attorneys have a tendency to fall in love with their demeanor. Too often, I see attorneys convincing themselves that the friendly or thoughtful jurors will see the light and be receptive to their case. No true. Give your friendly, reasonable-sounding jurors just as much scrutiny as your outspoken or disagreeable jurors. A juror's demeanor and the volume of their voice tell you far less about their predispositions than the profiles you developed before you met your jurors, so stick to your profiles and stick to your guns in jury selection.

Mr. Plotkin is a jury consultant in Claremont, CA. He can be reached at harry@nextjury.com.

NOMINATIONS FOR THE SDDL BOARD OF DIRECTORS

The San Diego Defense Lawyers will have 7 new Board openings for the year 2009. Nominations for the Board must be received by SDDL Secretary, Eric Miersma, no later than November 26, 2008. His e-mail address is emiersma@bplawcorp.com. Ballots will be mailed to the membership no later than December 5, 2008. Ballots will be counted as of the close of business on December 31.

If you are interested in serving on the Board of Directors (or know of someone who you believe should) for the year 2009, please contact Eric (or any other Board member) to so advise. **DON'T HESITATE, DO IT NOW!!**

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THE BOTTOM LINE

Case Title: Lesley Mariscal, individually and dba Hopscotch v. Daeco Insurance Services; David Afshin Ebadat

Case Number: 37-2007-00065313-CU-BC-CTL

Judge: Honorable John S. Meyer

Plaintiff's Counsel: Robert Tyson, Esq. and Kristi Deans, Esq., Tyson & Mendes, LLP

Defendant's Counsel: Bruno Katz, Esq. and Pat Howe, Esq., Shea Stokes Roberts & Wagner

Type of Incident/Causes of Action: Professional negligence, fraud, breach of fiduciary duty.

Plaintiff hired defendant Ebadat, an insurance broker, to obtain a commercial general liability insurance policy for her business. In April 2005, plaintiff sold Hopscotch. Later, the buyer sued plaintiff on several grounds arising out of the sale, including failure to obtain insurance coverage. Plaintiff tendered the lawsuit to Nautilus Insurance Company, the insurer on the policy obtained by defendant Ebadat. Nautilus declined plaintiff's tender and advised plaintiff the policy had been canceled for failure to pay premiums, and even if the policy had not been canceled, the claim would not be covered. Plaintiff sued Defendants for taking her money and allowing her insurance policy to lapse. Evidence at trial showed defendants had bounced numerous checks out of their client trust account, including a check to Nautilus to pay for the Hopscotch policy. Furthermore, prior to the closing on the sale of Hopscotch, defendants faxed plaintiff a Certificate of Liability Insurance, misrepresenting that plaintiff had an insurance policy when defendants knew the policy had already been cancelled.

Settlement Demands and Offers: Defense CCP \$998 of \$47,000 prior to trial; Plaintiff's initial demand was \$700,000. Plaintiff served a CCP \$998 Offer to Compromise for \$949,000. The day before trial, Defendants offered \$200,000 to settle the case. Plaintiff demanded \$400,000 to settle. During jury deliberations, Defendants offered \$250,000. While still deliberating, Defendants subsequently offered a High/Low settlement wherein the jury returned a verdict but the High awarded would be no greater than \$400,000 and the Low would be no less than \$50,000. Plaintiff countered with a High/Low settlement of \$1,000,000/\$200,000. Defendants did not respond.

Trial Type: Jury

Trial Length: 7 days

Verdict: \$1,301,017 Total Jury Verdict for Plaintiff broken down as follows: (1) Economic Damages: \$101,017; (2) Noneconomic Damages: \$900,000; (3) Punitive damages against defendant David Ebadat: \$300,000. The proposed Judgment as of August 21, 2008 is \$1,431,790.77, which includes costs of \$65,544.70 and pre-judgment interest for a successful CCP 998 Offer of \$65,229.07.

BROWN BAG PROGRAMS

Brown Bag Series Summary – September 19, 2008

Jury Instructions and Special Verdict Forms

by James Wallace- Lewis, *Brisbois, Bisgaard & Smith*

We were fortunate enough to have Judge Joan M. Lewis present to the 56 in attendance, a primer on the do's and don'ts of jury instructions. Her Honor was the sole presenter, covering an hours worth of materials without notes. Her presentation was smooth and seamless as she providing valuable insight to both the new lawyers as well as the many A.B.O.T.A members in attendance.



Special Jury Instructions and Special Verdict forms drew the most questions. Judge Lewis shared her experiences regarding the acceptable and the proper way to present these documents in a manner that the judge will be more inclined to accept.



Other than the numerous substantive points on jury instructions that were outlined by Judge Lewis, the surprise of the presentation focused on the fact that even seasoned attorneys do not meet with opposing counsel to finalize instructions. Big time trial lawyers frequently complete evidence without having the special and standard instructions cleaned up and ready to go.

Our thanks go out to Judge Lewis for taking her time out of her busy schedule to come speak to a very attentive audience.

SAVE THE DATE!!

2009 INSTALLATION DINNER

On Saturday night, January 24, 2009 San Diego Defense Lawyers will celebrate its 25th Anniversary by honoring the 6 original members of the SDDL Steering Committee at a gala event at the Hardrock Hotel here in San Diego. Way back in 1984, later to become superior court judges Adrienne Orfield, Michael Orfield, Ron Johnson, and Dave Danielsen, and attorneys Buz Sulzner and Jack Winters gathered together the defense bar's leading attorneys and created what has become one of the biggest and best local bar organizations in the country. On January 24, 2009 we will celebrate with these distinguished individuals at a black tie optional dinner event which will be a night to remember. Be sure to mark you calendar today. Invitations to all Members and both the Judiciary and other distinguished guests will be sent later this year. For further information, be sure to contact Installation Dinner Chair, Danielle Nelson. Her e-mail address is dnelson@fmlegal.com

Did you know...?



By: Mark Angert, Esq.,
DiCaro Coppo & Popocke,
mark.angert@dcp-law.com

Hello everyone. Before I proceed to share the knowledge, please note that my contact information changed, so for those of you who want to share your comments or suggestions on my articles,

please email me at mark.angert@dcp-law.com. So here we go:

Did you know that using an expert declaration as basis for filing a Motion for Summary Judgment may no longer be sufficient? On April 1, 2008, California Court of Appeal, Second District, in *Garibay v. Hemmat*, (2008) 161 Cal.App.4th 735 reversed the MSJ granted by the lower court, because the appellate court found that defendant's motion for summary judgment failed to meet the burden of production of evidence.

In *Garibay*, defendant's MSJ relied solely on the opinion of a medical expert witness who testified that the defendant did not commit medical malpractice. The expert declaration was a standard declaration stating that the expert reviewed the pertinent medical records and had personal knowledge of the custom and practice in defendant's field. The Court of Appeal reversed the MSJ because the records to which the expert was referring, were not properly admitted into evidence and therefore the declaration was based on improper hearsay. *Id.* at 736.

The court concluded, "because the declaration of defendant's medical expert witness had no evidentiary foundation, defendant failed to meet his burden of production and did not shift that burden to plaintiff." *Id.* at 741. The court did acknowledge that although hospital records are hearsay, they can be admitted into evidence, if these records are properly authenticated. *Id.* at 742.

Without such proper authentication the declaration that refers to these records has no evidentiary

basis and therefore the opinion of the expert has no evidentiary value. Now before you attach the entire medical chart, which for some plaintiffs can be extremely lengthy, I suggest you review Evidence Code §1271, for proper authentication methods.

Moving on to something less complicated but very common. Did you know that Form Interrogatories which are propounded to defendant, have a spelled out objection on the form's face? I am referring to section 16.0 of Form Interrogatories, otherwise known as Defendant's Contentions-Personal Injury.

Given the preprinted format of these interrogatories, plaintiff tends to check all that apply and send them on their way. Now instead of coming up with creative objections or actually trying to answer these interrogatories (I know that's unheard of, for some attorneys) I would refer you to the first page of the Form Interrogatories, section 2 (d). This section specifically states that section 16.0 "should not be used until the defendant has had a reasonable opportunity to conduct an investigation or discovery of plaintiff's injuries and damages." Now who is to say when this reasonable opportunity has occurred, but at least it provides a less argumentative basis for objecting to this set of interrogatories.

Did you know that according to San Francisco city laws, it is illegal to wipe one's car with used underwear? Now I am all for useful laws. However, I can't help it but feel sorry for the person who actually had to initially propose this law, and I wonder if it received any opposition?

As always, remember, what may be obvious to some, may have completely escaped other's attention, and hopefully this editorial can be used to share your individual "tricks of the trade" to help your fellow members. I encourage you to email me with your comments and suggestions for the next editorial at mark.angert@dcp-law.com. Until next time, I look forward to seeing your comments, and who knows we just may learn something.



THE BOTTOM LINE

Case Title: Isaac Velasquez, III v. Buffalo Joe's LLC, dba Whiskey Girl, et al.

Case No.: 37-2007-67464-CU-PO-CTL

Judge: Honorable Yuri Hofmann

Plaintiff's Counsel: Joseph N. Casas, Esq. and Tamara M. Craft, Esq., Casas Law Group, PC

Defendant's Counsel: Timothy S. Noon, Esq. and Kathy J. Steinman, Esq., Noon & Associates, APC

Type of Incident/Causes of Action: Alleged excessive force by doorman subduing unruly patron. Plaintiff/patron alleged: Assault, Battery, intentional infliction of emotional distress, negligent infliction of emotional distress, Negligent Hiring, Negligent exercise of retained control and respondeat superior

Settlement Demand: Plaintiff later demanded \$50,000.00, which was rejected by Defendant. Plaintiff then issued a demand in the amount of \$20,000.00. Defendant did not respond and the case proceeded to trial.

Settlement Offer: Defendant issued a CCP §998 offer in February 2008 for \$1,000.00, which expired with no response.

Trial Type: Jury

Trial Length: Four Days

Verdict: The twelve-person jury returned a 100% defense verdict and Judgment was entered in favor of Defendant with CCP §998 fees and costs of \$13,075.99.

Case Title: Hassan Yarpezhkan v. Sullivan Hill Lewin Rez & Engel / Sullivan Hill Lewin Rez & Engel v. Yarpezhkan

Case Number: GIC850949

Judge: Honorable Ronald S. Prager

Plaintiff's Counsel: Deborah A. Wolfe

Defendant's Counsel: Daniel M. White, Esq. and Steven G. Amundson, Esq., White & Oliver

Type of Incident/Causes of Action: Yarpezhkan claimed breach of fiduciary duty and overbilling for representation in the underlying securities fraud litigation. Sullivan Hill Lewin Rez & Engel cross-complained for unpaid fees

Settlement Demand: \$3.3MM on complaint; Unpaid fees on cross-complaint

Settlement Offer: None

Trial Type: Jury

Trial Length: 6 weeks

Verdict: Defense verdict against Yarpezhkan complaint; \$76,766 quantum meruit award on cross-complaint

A Word from Lou on Jury Selection

Jury Selection

By: *Louis S. Scofield, TX Louis S. Scofield, Esq.*

The problem with writing the definitive article on jury selection is that every one of you thinks you know how to do it better than anyone else. Once you get to this level of Big Shot Courtroom Lawyer you are likely, and justifiably, set in your ways. After all, jury selection is an art, not a science, with each of us using colors and brush strokes, bold and light, that we believe work best. Still, there are a few universal rules that you forget at your peril. Some of them are:

1. Remember the rule of "P:" Strike all preachers, politicians, pipefitters and welders. I know "welders" doesn't start with a "P" but strike them anyway.
2. Remember Luke, "Trust the force:" Always trust your instincts. Some call it "vibes." Some call it "intuition." Whatever you call it, no matter how good, charming, or wonderful a prospective juror seems to be, never let one that gives you the creeps get on the jury. In his bestselling book *Blink*, Malcolm Gladwell will teach you to trust your gut feelings. In it he discusses countless studies that prove your intuitive reactions, born of experience, are well founded and best followed.
3. No place for pride: The jury selection process has so many dynamics that you can use all the help you can get. I always recruit my client and any other assisting folks to help with peremptory strikes. It is remarkable what another set of eyes and ears can pick up. In other words, sometimes your well crafted questions are no match for the observations made by your client during voir dire (pronounced "vore dye-er" not "vwa-deer" like you latte'-sipping Granola crunchers like to say it).
4. Ignore the popular tricks: For example, ignore body "language" and bumper stickers. Most body "language" is useless in jury selection. No one, including the person supposedly speaking with their body movements, knows the "language" and it is inherently ambiguous. Of course, if a prospective juror is obviously mouthing to you that "you suck," you might consider exploring the issue further...but only if you don't mind the rest of the courtroom learning what you suck at. Risky though, because you don't know if the juror intends the expression as an adjective or a verb.

More to the point, if I see a man with crossed arms, it could mean that he has a closed mind. But it could just as easily mean that the folks on either side of him are occupying the arm rests, or, better yet, that he likes to cross his arms. Most body "language" is much too subtle for me.

Then there are juror bumper stickers. Asking what is on a juror's bumper sticker only leads to more questions, such as, "Is it your car, or your son's?" "Was the sticker on there when you bought the car?" "Are you proud of it, or is it like your tattoo, something you deeply regret putting there?"

5. Folks, if you can't think of a better reason to strike a juror than folded arms, or if you can't think of a better question than the bumper sticker question, you need to re-think your approach. Don't forget to use the "tried and trues": These are countless. Here's a couple: Begin your voir dire by asking each of the jurors whether they have made up their mind. Second, as time is allowed, tell the panel as much as you can about your case. [In Texas voir dire is closing argument, and if you haven't won the case by the time you sit down you are in big trouble.] Ask each juror if they can be fair, and watch each as they answer. This isn't a wasted question if you use it well. You already know your personal "tried and trues." Don't abandon them in favor of some new methodology . . . which leads us to jury consultants.
6. Jury Consultants. I have to confess to a bit of prejudice here. I think jury consul-

tants are useful, but not for their advertised purposes. Jury consultants are an extra set of eyes and ears, which are noted above as quite useful. Beyond this they sometimes add a layer of E&O coverage, plus they might even give you a little more credibility in the eyes of an unfamiliar client.

But I have always been suspicious of the substantive benefit of jury consultants, focus groups, mock juries, summary trials, and shadow juries, because they tell you little that you didn't already know, to wit: regardless of your forum, judge, jury, facts, dazzling talents, and the ability to tell the future, any given jury can rule any way at any time. All of us have won cases that we should have lost and lost cases that we should have won. The best our experience allows us to do is suggest percentage chances of outcomes, were we to imagine the case being tried, say 10 times before 10 different juries, you might say you'd expect

to prevail 6 or 7 times out of 10.

In this regard let me tell you the Johns Manville story. Pay attention, because the way I tell it, it's almost true. The story goes that Justice Parker (5th Circuit, retired) when he was a District Judge here, decided to prove to the asbestos defendants, especially Johns Manville, that they could not win an asbestos case on liability. To accomplish this, 5 cases were brought to trial simultaneously with 5 juries being selected. The issues at trial were liability alone, tried simultaneously in one court room, before all 5 juries. They heard the same evidence, the same lawyers, the same judge, the same charge, and the results were 5 different verdicts ranging from Johns Manville being completely exonerated by one jury, to a verdict finding Johns Manville guilty of gross negligence and exposed to punitive damages. The other juries filled-in the spectrum between these two extremes. As you might

imagine, I consider this little "experiment" as pretty stout justification for my suspicion of jury consultants, focus groups, mock juries and shadow juries.

But my suspicion only goes so far. I am pro-jury trial. If you exercise your strikes wisely, you will sharpen the group to some extent, and increase the likelihood that you can elevate them to their oath. It is then my personal experience that 90% of the time juries do the right thing. Although, half of the time they do the right thing, they do it for the wrong reasons. Still and all, warts and all, a jury, more focused by your crafty jury selection skills, will be more likely to listen favorably to your tale, and in any event, is a lot better than a panel of arbitrators, a panel of judges, or a panel of welders.

Mr. Scofield is a shareholder of MehaffyWeber PC in Beaumont, Texas. He is a member of ADTA.

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Mediator

SDDL Golf Tournament: Second Time Charm!

On July 18th, San Diego Defense Lawyers descended upon Twin Oaks Golf Course in San Marcos for "Round 2" of the annual golf tournament to benefit Juvenile Diabetes Research Foundation and take turns at admiring SDDL President, Ken Greenfield's amazing golf swing..... well, at least the charity was well served! Most of you remember the downpour that was experienced during the first scheduled date on May 23rd. In the past 10 years, there had only been two tournaments rained out: ours and one other. Fortunately, most everyone was able to return, especially the hardworking legal vendors, and a great day on the links was finally had! Congratulations to the following golfers:

First Place with a score of 58: Erik Thorsnes, Mike Thorsnes, Jim Drimmer and Steve Kennon.

Second Place with a score of 57: Dave Miller, Steve Jewell, TJ Galati and Ryan Gillispie

Third Place with a score of 60: Mark Kalish MD, Dom Addario MD, Greg Konoske, Sam Sherman

And.....last place with a score of 78.....well, guess you had to be there to find out!

Also, in an amazing show of "luck", Ken Greenfield won the Nordstrom gift certificate. The SDDL board has formed a sub-committee to investigate the issue, and incoming SDDL president Darin Boles promises a full and speedy investigation on how a guy, who has now been approached to do trenching for AT&T, managed to score under 100 and also win the gift certificate on the same day! No one can be THAT lucky!

A big Thank You to SDDL 2008 Golf Committee: Darin Boles, Jim Boley, and Danielle Nelson. And an even bigger Thank You to the sponsors who made twice the effort to support our tournament this year! Please take a look at the list of sponsors and show them your support as well!



1st Place Winners- Scott Kennedy, Adriana Cespedas, Jim Dimmer and Erik Thorsnes



2nd Place winners- The foursome from Farmer Case & Fedor, including TJ Galati, Steve Jewell, Ryan Gillespie and Dave Miller



3rd Place Winners Dr. Mark Kalish and Dr. Dominick Addario, along with Jim Boley, presenting the award



Joel Bryant, Richard Huver and John Gomez



Chuck Haughey, Ken Greenfield and Judge Vinnie DiFiglia



Ken Medel and Jeff Parrot



Dino Bizunis officiates the auction



Representatives from Shelburne Sherr Court Reporters provide respite for weary golfers



Bill Hughes of Hughes & Nunn



Sasha Selfridge and Kimberly Weber help players check in



Erin Pederson, Bridget Mastrobattista and their friend

Employment Law Update

Brinker Restaurant Corp. v. Sup. Ct.: Class Certification Order For Employee Class Vacated, Court Finds Individual Issues Predominate Claimed Rest Break and Meal Period Violations and Working Off-the-Clock Claims



The Court of Appeal recently held in *Brinker Restaurant Corp. v. Sup. Ct.* (2008) 165 Cal.App.4th 25, that individual issues pre-

dominated alleged rest break and meal period violations and working off-the-clock claims and issued a peremptory writ of mandate directing the trial court to vacate its class certification order¹. Specifically, the *Brinker* court found that employers are not required to ensure that employees take meal or rest breaks, but must simply make them available. *Id.* at 31. Employers need only authorize and permit rest periods every four hours (or major fraction thereof), the rest break does not have to be in the middle of each work period, and employers are not required to provide a meal period for every five consecutive hours worked. Since rest and meal breaks need only be made available (not ensured) determination of violations of Labor Code section 226.7(a)² would require an individualized inquiry, thus individual issues predominate and the claims were found not to be amenable to class treatment. *Id.* at 31. Further, although employers cannot coerce, require or compel employees to work off-the-clock, employers are only liable if the employer knew or should have known the employee was working off-the-clock. *Id.* Plaintiffs' claims of being forced to work off-the-clock were found not to be amenable to class treatment because individual issues predominated on the issues of whether Brinker Restaurant Corporation ("Brinker") forced employees to work off-the-clock, whether Brinker changed time records, and whether Brinker knew or should have known employees were working off-the-clock. *Id.*

Background

Brinker operates over a hundred restaurants in California, including Chili's and Romano's Macaroni Grill. *Id.* at 32. Brinker has written policies regarding meal periods and rest breaks which provide that employees are entitled to a 30 minute meal period when they work a shift over five hours and a 10 minute

rest break when they work a shift over 3 ½ hours. *Brinker Restaurant Corp. v. Sup. Ct.*, *supra*, 165 Cal.App.4th at 32. Brinker has a written policy prohibiting employees from working off-the-clock. *Id.*

Plaintiffs filed suit against Brinker alleging three types of wage and hour violations: failing to provide rest breaks for every four hours (or major fraction thereof) worked per day to non-exempt employees; failing to provide meal periods for days on which non-exempt employees worked in excess of five hours (or failing to provide meal periods at all, or failing to provide second meal periods for days employees worked in excess of 10 hours); and, unlawfully requiring employees to work off-the-clock during meal periods. *Id.* at 33-34.

Plaintiffs moved to certify a class of all present and former non-exempt Brinker employees who worked at a Brinker restaurant from August 16, 2000 to April 2006. The class members were alternatively identified as all hourly employees of Brinker restaurants in California who have not been provided with meal and rest breaks in accordance with California law. *Id.* at 36. Plaintiffs asserted, among other things, that Brinker's "corporate policies of improper early meals, time shaving, failing to provide meal periods altogether or for less than [30] minutes, failure to provide rest periods, and forcing 'off-the-clock' work, are centralized and common to the Class." *Id.* at 37. The trial court granted the motion and certified the proposed class finding that "common issues predominate over individual issues." *Brinker Restaurant Corp. v. Sup. Ct.*, *supra*, 165 Cal.App.4th at 40. Brinker filed a petition for a writ of mandate, challenging the certification order.

Standard of Review

The *Brinker* court noted, "[a] certification order generally will not be disturbed unless (1) it is unsupported by substantial evidence, (2) it rests on *improper criteria*, or (3) it rests on *erroneous legal assumptions*. [Citations.]" *Id.* at 41, citing *Fireside Bank v. Sup. Ct.* (2007) 40 Cal.4th 1069, 1089, italics added. A class certification order "based upon *improper criteria or incorrect assumptions* calls for reversal "even though there may be substantial evidence to support the court's order." [Citations.]" *Brinker Restaurant Corp. v. Sup. Ct.*, *supra*, 165 Cal.App.4th at 41 [Citation].

The party seeking class certification has the burden to establish "(1) . . . a sufficiently numerous, ascertainable class, (2) . . . a well-defined community of interest, and (3) that certification will provide substantial benefits to litigants and the courts, i.e., that proceeding as a class is superior to other methods." *Fireside Bank, supra*, 40 Cal.4th at 1089. The community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. *Id.* In order to determine whether common questions of law or fact predominate, "the trial court must examine the issues framed by the pleadings and law applicable to the causes of action alleged." *Hicks v. Kaufman and Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916. In a wage and hour case, the trial court is required to determine the elements of plaintiffs' claims. *Brinker, supra*, 165 Cal.App.4th at 42. Brinker challenged only the first factor of predominance. The *Brinker* court found the trial court erred in finding the applicable law need not be resolved as part of the certification process. *Id.*

Rest Break Claims

In analyzing plaintiffs' claim for failure to provide rest breaks for every four hours (or major fraction thereof) worked per day to non-exempt employees, the *Brinker* court began by interpreting IWC Wage Order No. 5-2001, as codified in California Code of Regulations, title 8, section 11050, subdivision 12(A), (hereafter "Regulation 11050(12)(A)").³ *Brinker, supra*, 165 Cal.App.4th at 43-44. The court concluded that the phrase contained in Regulation 11050(12)(A), "per four (4) hours or major fraction thereof" does not mean that a rest break must be given every three and one-half hours. *Id.* at 44. Instead, Regulation 11050(12)(A) provides that the calculation of the appropriate number of rest breaks must be based on the total hours worked daily. Therefore, if the work period is

³ Regulation 11050(12)(A) provides, in part: "Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours."

¹ A Petition for Review was filed on August 29, 2008.

² Labor Code section 226.7(a) provides: "No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission."

seven hours, the employee is entitled to a rest period after four hours of work because he or she has worked a full four hours, not “a major fraction thereof”. *Id.* “It is only when an employee is scheduled for a shift that is more than three and one-half hours, but less than four hours, that he or she is entitled to a rest break before the four hour mark.” *Id.*

The *Brinker* court rejected plaintiffs’ argument that rest breaks must be provided every three and one half hours and plaintiffs’ reliance on a 1999 DLSE opinion letter which provided that for every four hours (or majority fraction thereof) the employee earns 10 minutes rest time. According to the 1999 DLSE opinion letter, if an employee works more than 2 but less than 6 hours, the employee is entitled to a 10 minute break. The DLSE’s interpretation of “major fraction thereof” was incorrect, because it rendered the current version of Regulation 11050(12)(A) internally inconsistent. It is nonsensical that an employee would be entitled to a 10 minute break if he or she works more than 2 hours when Regulation 11050(12)(A) provides that employees are not entitled to a 10 minute break when they work less than 3 ½ hours. *Brinker, supra*, 165 Cal.App.4th at 45. Moreover, Regulation 11050(12)(A) does not require the rest break to be in the middle of each work period, only that it be given in the middle of the work period if practicable. *Id.* at 46. Finally, since *Brinker* employees could waive their rest breaks, *Brinker* was not obligated to make certain the employees actually took the breaks. *Id.* at 48.

Based on the foregoing, any showing on a class basis that plaintiffs or other members of the proposed class missed or took shortened rest breaks “would not necessarily establish, without further individualized proof” that *Brinker* violated Labor Code 226.7(a) and Regulation 11050(12)(A). *Brinker, supra*, 165 Cal.App.4th at 48. Because only individual questions remained, the trial court should have denied class certification on these claims.⁴ *Id.*

Meal Period Claims

Plaintiffs claimed *Brinker* failed to provide meal periods for days on which non-exempt employees worked in excess of five hours (or failed to provide meal periods at all, or failed to provide second meal periods for days employees worked in excess of 10 hours). The *Brinker* court found the trial court incorrectly

determined that a meal period must be given before an employee’s work period exceeds five hours. *Id.* at 51. Moreover, since the trial court’s “rolling” five hour meal period ruling was erroneous, the class certification order rested on improper criteria with respect to plaintiffs’ “rolling” five hour meal period claim and could not stand. Labor Code section 512(a) provides, in essence, that an employer has a statutory duty to make a first 30 minute meal period available to an hourly employee who works more than five hours per day (unless the work period is six hours or less, and the employer and employee agree to waive the meal period). Labor Code section 512(a) further provides that an employer has a statutory duty to make a second 30 minute meal period available to an hourly employee who works more than 10 hours a day (unless the work period is twelve hours or less, the employer and employee agree to waive the meal period, and the first meal period was not waived). Plaintiffs argued, and the trial court agreed, that *Brinker*’s meal policy violated Labor Code section 512(a) and IWC Wage Order No. 5 because it allowed early lunching and failed to make a 30 minute meal period available to an hourly employee for every five consecutive hours of work. The *Brinker* court rejected this interpretation, because it would render Labor Code section 512(a) meaningless. *Brinker, supra*, 165 Cal.App.4th at 52.

The Court concluded the trial court abused its discretion in certifying the class to the extent it relied on an erroneous interpretation of Labor Code section 512(a). *Id.* at 54. “Without a proper interpretation of section 512(a), the court could not correctly ascertain the legal elements that members of the proposed class would have to prove in order to establish their meal period claims, and thus could not properly determine whether common issues predominate over issues that affect individual members of the class.” *Id.* In addition, as with the rest break claims, a California employer need only provide the meal period, and is not required to make certain the employee takes it. *Id.* at 55. Because meal periods need only be made available, (not ensured) individual issues predominate and the meal period claim is not amenable to class treatment. “The reason meal breaks were not taken can only be decided on a case-by-case basis. It would need to be determined as to each employee whether a missed or shortened meal period was the result of an employee’s personal choice, a manager’s coercion” or because restaurants were inadequately staffed such that employees could not take meal periods. *Id.* at 58.

Working Off-the-Clock Claims

The Court also rejected class treatment for the working off-the-clock claims. An employer can only be held liable for off-the-clock claims if the employer knows or should have known the employee was working off-the-clock. *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 585. Plaintiffs did not dispute that *Brinker* had a written policy prohibiting off-the-clock work. Plaintiffs proposed proving class-wide violations by *Brinker* by submitting declarations, statistical evidence and survey evidence showing the number of times employees worked during a meal period and the number of times changes were made to time cards. *Brinker, supra*, 165 Cal.App.4th at 60-61. However, there was no evidence presented on a class-wide basis as to why an employee worked off-the-clock. *Id.* at 61. There would be no way to tell whether employees were required to work off-the-clock, did so by choice, or whether their supervisors had knowledge of the off-the-clock work. Therefore, resolving these claims would require “individual inquiries in to whether any employee actually worked off-the-clock, whether managers had actual or constructive knowledge of such work and whether managers coerced or encouraged such work.” *Id.* at 61. Similarly, allegations of “time-shaving” would also necessitate an individualized inquiry. Thus, the off-the-clock claims were found not to be amenable to class treatment.

Conclusion

The *Brinker* court issued a peremptory writ of mandate directing the trial court to vacate its class certification order and enter a new order denying with prejudice certification of plaintiffs’ rest break, meal period and working off-the-clock subclasses.

Editor’s Note: The California Supreme Court granted the Petition for Review on October 22, 2008.

⁴ The *Brinker* court noted that its conclusion that individual issues predominate in the matter before it did not dictate that claims asserting violations of rest break laws could never be certified as a matter of law.

THE BOTTOM LINE

Case Title: Harriet Hennis v. Jeffrey P. Wasserstrom, M.D.; Eye Associates of San Diego

Case Number: 37-2007-00060165-CU-MM-EC

Judge: Honorable Timothy W. Tower (East County)

Plaintiff's Counsel: Amy J. Wallace

Defendant's Counsel: Michael I. Neil, Andrew R. Chivinski

Type of Incident/Causes of Action: Plaintiff alleged medical negligence against defendants stemming from a cataract extraction procedure. Plaintiff developed post-operative endophthalmitis and ultimately lost all vision in her right eye. Defendants contended all proper and requisite prophylactic measures were taken to guard against infection and, further, that once signs and symptoms of infection became present all reasonable and necessary efforts were made to save the eye. Experts in Ophthalmology and Infectious Disease were called to testify regarding the standard of care in preventing endophthalmitis following cataract surgery, and also to testify regarding the nature of the specific microbe (*bacillus cereus*) which caused the infection in this particular case.

Settlement Demand: \$29,999.99

Settlement Offer: Waiver of Costs

Trial Type: Jury

Trial Length: 5 days

Verdict: Defense. 10-2 on issue of liability (no negligence).

Employment Law Update

Alch v. Superior Court (Time Warner Entertainment Company) **(2008) 165 Cal.App.4th 1412**



By *Conor J. Hulbert, Esq., White Oliver & Amundson*

On August 14, 2008, the Second District Court of Appeals held that a trial court abused its discretion when it sustained the objections of third parties to the disclosure of subpoenaed information on privacy grounds, without considering whether partial disclosure would better satisfy the balance between the litigants' need for discovery, and the third parties' privacy interests.

The case began in 2000, when hundreds of television writers filed class action lawsuits against some of Hollywood's largest employers, including Time Warner, Dream Works, Fox, Disney, ABC, Miramax, NBC, and Universal, alleging an industry wide pattern and practice of age discrimination.

During the discovery phase of the lawsuits, the writers served subpoenas on numerous third parties, including the Writers Guild of America and various payroll companies. The subpoenas sought personal information about the guild members, including demographic information, employment and agency representation, earnings, employment applications, and writing qualifications.

The writers claimed the information was necessary for statistical analyses of the hiring practices of the employers.

Because the requested information implicated the privacy rights of nonparty individuals, the parties sent an objection form to approximately 47,000 persons whose information was contained in the databases of the subpoenaed third parties. Approximately 7,700 recipients objected to the disclosure of the information. The writers moved to overrule the objections.

Los Angeles Superior Court Judge Wendell Mortimer Jr., now retired, sustained the objections in their entirety, holding that the objectors' privacy rights outweighed the public's interest in pursuing the litigation. "The over 7,700 objectors do not ask for, or want, any part of this lawsuit. They merely want to be left alone," he wrote.

The writers petitioned for a writ of mandate directing the trial court to vacate its order and

issue a new order permitting access to only part of the information originally requested, including basic demographic and employment data.

Writing for the appellate court, Justice Candace Cooper explained that under the dictates of *Valley Bank of Nevada v. Superior Court* (1975) 15 Cal.3d 652, 658, trial courts should impose partial limitations rather than an outright denial of discovery wherever possible when the information sought infringes on an individual's reasonable expectation of privacy, but is directly relevant to a party's claims and essential to the fair resolution of their lawsuit.

"Statistical proof is indispensable in a disparate impact case," she wrote. "The writers cannot prove their disparate impact claims without access to evidence from which they can perform a statistical analysis. Consequently, we find the conclusion is virtually inescapable that the writers have a 'compelling need' for the information they have sought, which is clearly 'directly relevant' to their claims and 'essential to the fair resolution' of their lawsuit."

Cooper concluded the trial court's "wholesale denial" of access to the objectors' information was an abuse of discretion.

"It used a broad brush to deny the writers access to all data about the objectors out of hand, and wholly failed to consider whether a more nuanced approach to the different categories of data would satisfy the balance that must be struck between privacy interests and a litigant's need for discovery."

Cooper was also critical of the trial court's "short shrift" to the public interest in pursuing the litigation.

"The state has an interest in the ascertainment of truth in all legal proceedings in its courts," she wrote. "This interest is accentuated in cases of discrimination, as California unquestionably has a legitimate and compelling state interest generally in the battle against discrimination on the basis of race, gender, age, national origin, or other invidious categories of discrimination."

Finally, Cooper was critical of the trial court's failure to address the significance of the "admittedly strong" protective order already in place to protect the information sought in reducing privacy concerns.

Justice Patricia Bigelow dissented.

Bigelow argued that the writers did not dem-

onstrate that the information from the 7,700 objectors was essential to a fair resolution of the lawsuit, because the trial court found the remaining persons who did not object to disclosure formed a sufficient pool to proceed with the statistical analysis.

“There is no question there is a significant interest in preventing invidious discrimination, as the majority states,” Bigelow wrote. “But under these facts, and in light of the information available to plaintiffs from the non-objectors, the trial court could reasonably conclude the right to privacy asserted by the 7,700 nonparty objectors outweighs the plaintiff’s need for their confidential information.”

The significance of the Alch opinion for defense attorneys is that it strengthens class action plaintiffs’ access to nonparty individuals’ private information, and requires defense attorneys to carefully delineate between subpoenaed information that is “necessary” to the plaintiffs’ case and information that is unnecessary when fashioning our clients’ objections to the disclosure of their private information.

Like so many Hollywood stories, however, the Alch opinion is gearing up for a sequel. The employers filed for review by the California Supreme Court on September 23, 2008, leaving the rest of this article, “to be continued ...”



*Front row left to right: Lori Guthrie, Danielle Nelson, Michelle Van Dyke and Tracey Moss VanSteenhouse
Back row left to right: Ken Medel, Brian Rawers, Darin Boles, Ken Greenfield, Randy Nunn, James Boley, Eric Miersma*

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

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

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

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★ Member News ★



Noon & Associates, APC is pleased to announce the addition of our new associate, **Michael R. Buscemi, III**, to the firm on August 28, 2008. Mr. Buscemi received his Juris Doctorate from the University of San Diego School of Law in 1999. Mr. Buscemi has an extensive background in complex civil litigation, construction defect litigation, contract disputes, mechanic’s lien law, insurance coverage and bad faith litigation.

Ian Williamson, Esq. has taken a position as Senior Counsel at Gordon & Rees where he is a member of their Environmental and Toxic Tort practice group.



Alan Greenberg



Lane Webb

Wood Smith Henning & Berman LLP is proud to announce the opening of their San Diego office. Five attorneys from Wilson Elser’s San Diego office join Wood Smith. **Alan Greenberg** joins Wood Smith as Senior Counsel. **Lane Webb** (former Managing Partner of Wilson Elser’s San Diego office) also joins Wood Smith as a Partner. **Wyeth Burrows**, **Peter Burfening** and **Chris Hook** join the firm as Associates.



Dan Deuprey is pleased to announce that he is providing mediation services through the National Conflict Resolution Center (NCRC). Mr. Deuprey is a Diplomat in ABOTA and has 36 years of experience in civil litigation. While he also continues to practice law with Deuprey & Associates, LLP, any mediations will be administered exclusively by NCRC.

cont'd on page 17

Summer Splash 2008!!

Members take some time off to enjoy the sun, open air and fun time!



The Guthrie family enjoyed a So. Cal. vacation this year spending time at Universal Studios-Hollywood and Knott's Berry Farm. When was the last time you rode the teacups? (or Knott's Berry Farm's version-the Mexican Hat Dance).



Not quite Summer of 2008, but still worthy of mention. Neil Dymott lawyers Jim Boley and Dane Bitterlin and plaintiff attorney Richard Grey climbed Mt. Whitney, the highest peak in the lower 48 States. They reached the Summit of 14,496 feet on September 24th at 10:45 a.m. PST. We asked Jim to go back and plant a flag emblazoned with the new SDDL logo on it, and thus far he has refused!



Ken Greenfield spends time with the "kids" in Mexico this summer.



Danielle Nelson enjoyed an ATV ride in Kauai churning up the mud.



Member **Robert Shields** of Wilson, Petty, Kosmo & Turner was recently honored in the San Diego Metropolitan Uptown Examiner and Daily Business report for his outstanding defense work on behalf of his many clients, many including major automobile and motorcycle manufacturers.

Rob has achieved excellent results in well over 100 product liability cases where he defended manufacturers involving allegations of product defect including manufacturing and design defects, as well as failure to warn claims. He has also defended manufacturers and litigated cases involving death and catastrophic injuries including paralysis, amputation, burns and brain injury.

As a young leader at his firm, Rob has supervised his firm's handling of over 500 cases for a single automotive client. He litigates cases involving claims of defective airbags, seatbelts, crashworthiness and rollovers. He has also been instrumental in implementing an internal firm policy, now adopted by several of his warranty clients, in creating an Early Case Assessment Report, which helps his clients make the appropriate business decision at the first chance. This provides his clients with training and counseling to help avoid litigation and how to evaluate and respond to warranty claims.

Rob is also active in DRI and speaks before local and national groups on such topics as mediation strategies and case evaluation. He has also served as Chair of DRI's National Strictly Automotive Section, which focuses on attorneys who represent/defend the automotive industry. As the Chair of the section, Rob coordinates the section's bi-annual convention, which brings together more than 300 national trial attorneys, in-house corporate attorneys, and governmental agencies to discuss recent trend/issues in automotive safety. He has also served as Chair of the Corporate Counsel Committee for DRI Young Lawyers, serving as editor of DRI's Young Lawyer's Corporate Counsel Law Update, which is circulated to all corporate counsel members.

In his personal life, Rob coaches Little League and mentors high school students through his church group. He is also a personal mentor to three young San Diego attorneys at different law firms as well as the associates at his own law firm. To top things off, Rob is the father of 5 years old triplets! Rob and his wife also speak to high school students about the importance of making good life choices.

The SDDL is proud to have Rob as a member. He certainly embodies our principles of Civility, Integrity and Balance. Cheers to you, Rob!

Founding Member of SDDL, Honorable Michael M. Anello was recently appointed to the federal bench, specifically the U.S. District Court for the Southern District of California. Senator Diane Feinstein provided a statement in support of his nomination with a brief synopsis of Judge Anello's legal career. Judge Anello graduated from Georgetown Law School and served in Vietnam as a member of the United States Marine Corps. After his military service, he moved to San Diego, where he worked as a Deputy City Attorney. He then joined the firm of Todd, Toothacre & Wingert as an associate. We all remember him from Wingert, Grebing, Anello & Brubaker (now Wingert, Grebing, Brubaker & Goodwin), with which he was affiliated when he was appointed as a judge to the California Superior Court in 1998. He was also on the Board of Directors of the SDDL from 1991-92.

The SDDL is proud to have been affiliated with Judge Anello and we wish him continued success on his journey of Civility, Integrity and Balance.

Edifications

What The Heck?



This is a phrase uttered by my 7 and 4 year old children at least 5 times a day. I don't think it's something I say, but it is somewhat of a reflex response when someone does something to you that offends your sense of what is right/appropriate or wrong/inappropriate. Of course, as adults, we often us a more grown up variation on this phrase, but the meaning is the same.

How does it feel when you go into court and your adversary says something completely contrary to what they just said in the hallway. Of course, your immediate response is "what the..." But since we are in front of the judge, we can't say that, so instead we say (because we have Civility, Integrity and Balance) "Your honor, that may not be entirely accurate...". Then we just go back to the office and talk about what a jerk the other guy (or girl) was... Or are we not supposed to do that either???

Sometimes it's hard to be civil to someone who repeatedly misleads the Court or fights with you on everything. But I urge everyone to check out the enclosed pamphlet provided by the SDCBA on the Attorney Code of Conduct so we can continue to be a more civil breed of attorneys.

This is my final edition as the Editor of The Update. It has been a privilege and an honor to put this Newsletter together and I hope everyone will continue to submit articles on important issues to our new Editor, Tracey Van Steenhouse. Submissions for the next edition can be e-mailed to her at Tracey.VanSteenhouse@wilsonelser.com.

Thanks again for all of your support!



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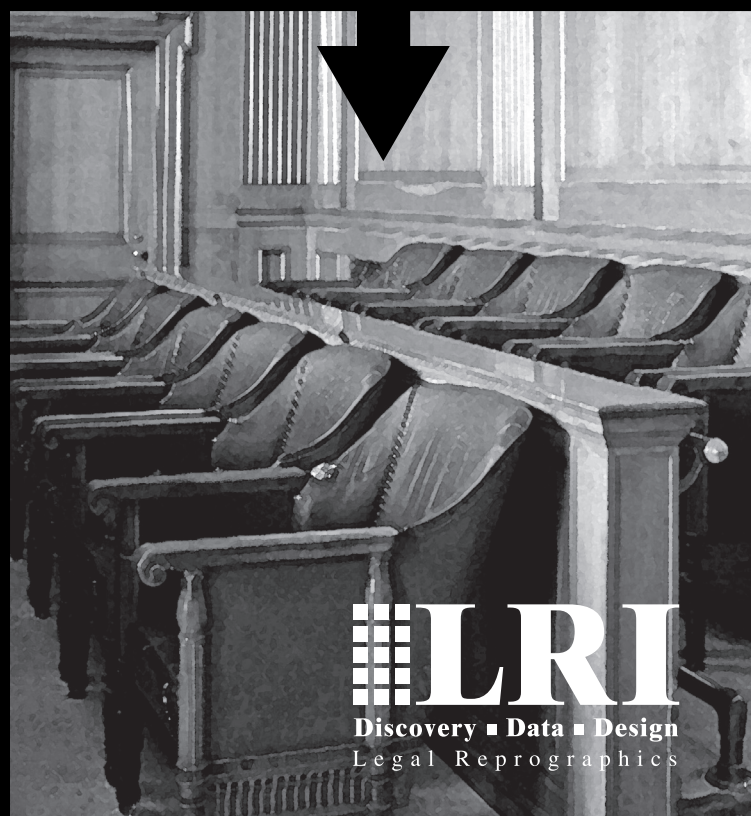
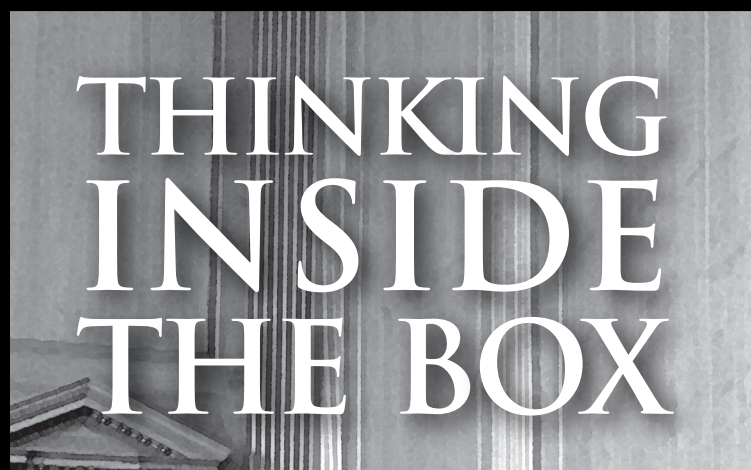
Janice Lau	Eric Miersma	Joseph Potocki	Bonnie Simonek	Robert Tyson
Patrick Laverty	Mina Miserlis	Cecilia Preciado	Amy Simonson	Michelle Van Dyke
Eric Leenerts	Vasko Mitzev	E. Kenneth Purviance	Linda Sinclair	Elizabeth Vann
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Susana Mahady	Michael Neil	Michael Rogaski	Fredenk Spiess	Lane Webb
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Michael Martin	Timothy Noon	Heather Rosing	Kathy Steinman	Shari Weintraub
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Hugh McCabe	Bethsaida Obra	Norman Ryan	Matthew Stohl	Timothy Williams
Gerald McCarthy	Susan Oliver	Anahita Sahba	Marichelle Tahimic	Ian Williamson
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Gloria McMillan	Mary Pendleton	Andrew Servais	Paul Traficante	Monica Yoon
Shawn McMillan	Brett Peterson	Steven Shewry	Timothy Treadwell	Fort Zackary
Kenneth Medel	Mark Peterson	Robert Shields	Sheila Trexler	Robert Zickert
Patrick Mendes	Charles Phillips	Dainel Shinoff	Tammara Tukloff	
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