Dealing With Difficult Lawyers

By Jan Michelsen, Esquire

Difficult. Rather, most are committed individuals who entered the profession to assist clients, serve the public, and enjoy interesting and challenging work, not to fight over petty issues with childish and unreasonable foes. If good lawyers do nothing to thwart difficult lawyers' “techniques” or let difficult lawyers call all the shots, the profession will lose those it least can afford to lose—lawyers who are committed to civility, competence, and professionalism. In addition, clients lose: The cost of litigation increases and the progression slows in almost direct proportion to the jerk-quotient of the lawyers involved. Lawyers who communicate and cooperate reach the same legal result, but at less expense and in a shorter time. The courts and judges also are impacted. The constant need for judicial intervention and hand holding is a waste of time and public monies.

Aside from the psychological and interpersonal costs of practicing with difficult lawyers, this behavior has serious consequences to clients, the court, and to the profession. Lawyers, both rookie and seasoned, cite their experiences dealing with difficult lawyers as the most despised part of their jobs, the aspect that most detracts from the quality of their work lives. Most attorneys are not difficult. Rather, most are committed individuals who entered the profession to assist clients, serve the public, and enjoy interesting and challenging work, not to fight over petty issues with childish and unreasonable foes. If good lawyers do nothing to thwart difficult lawyers’ “techniques” or let difficult lawyers call all the shots, the profession will lose those it least can afford to lose—lawyers who are committed to civility, competence, and professionalism. In addition, clients lose: The cost of litigation increases and the progression slows in almost direct proportion to the jerk-quotient of the lawyers involved. Lawyers who communicate and cooperate reach the same legal result, but at less expense and in a shorter time. The courts and judges also are impacted. The constant need for judicial intervention and hand holding is a waste of time and public monies.

Despite commitments to civility, professionalism, ethics, and excellence and a renewed attention by local, state, and national bar associations to the issue,

this unfortunate breed of difficult lawyers is unlikely to become extinct anytime soon. In the meantime, there are some simple, even intuitive, tips to help lawyers keep their cool, maintain their sanity, protect their reputations, and represent their clients in the face of adversarial excess, obstructionist conduct, or just plain obnoxious behavior.

Don’t engage

Whatever you do, don’t take the bait. If another lawyer raises her voice, lower yours. If that lawyer interrupts you, wait for her to finish before you respond. Return calls promptly even though she never does. Live up to your promises even though she routinely breaks hers. Don’t allow the difficult lawyer to hook into your frustration, anxiety or anger. Hold your temper and avoid escalating the conflict. Don’t meet aggression with aggression. It doesn’t work and your client will be disadvantaged in the process.

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President’s Message

As I write this, SDDL just finished its Thirteenth Annual Juvenile Diabetes Research Foundation Golf Tournament. For those who were there, you know it was a signature San Diego day: sunshine, fellowship, and fun with a purpose. Over one hundred golfers attended, and many more joined us for the dinner. The final accounting has not been completed, but it looks like a banner event that will translate into a very large donation to JDRF. If you were unable to make it, we hope to see you next year.

The next big ticket item on our agenda is SDDL’s National Mock Trial Competition, to be held October 17-19, 2013. In addition to our three local law schools, we have teams travelling from Georgetown, Stanford, SMU, U.C. Hastings, Pepperdine, and Santa Clara, among others. One of the biggest reasons teams consistently return to our competition is the quality of the judging. If you have not already agreed to judge for a night (or two!), we still need help, and information can be found on our website at www.sddl.org.

SDDL’s second pillar is integrity. As a brand new second lieutenant in the U.S. Army, I was told to do the right thing, even when I thought no one was watching. This is basic advice, and Edward Murrow (CBS’s prominent WWII correspondent) better suggested the following, more applicable to our profession: “To be persuasive we must be believable; to be believable we must be credible; to be credible we must be truthful.” Our work is founded in persuasion, whether with opposing counsel, the court, or our own clients, and maintaining our integrity is an indispensible element of service to both the people we counsel, and also our profession.

For those that have read this far, yes, the picture of the SDDL banner on top of Mt. Whitney is a real one, and ties into the next President’s Message on balance. Until then, I hope to see you at the SDDL Mock Trial Tournament.

Helping Lawyers Follow Lincoln’s Advice That is Still Good Today

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- Abraham Lincoln, Esq.

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THE UPDATE

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“LUNCH AND LEARN” PROGRAMS

Insurance Considerations in the Construction Context

By Beth Obra-White

On Tuesday, July 9, 2013 the San Diego Defense Lawyers presented its monthly “Lunch and Learn” MCLE seminar, the focus of which was “Insurance Considerations in the Construction Context.” The speaker, Andrew P. Fiorica, Esq., discussed practical considerations for lawyers representing and defending builders, contractors and subcontractors such as the importance of up-front review of insurance policies and understanding the impact of certain insurance provisions.

Mr. Fiorica indicated that almost all residential construction projects today are built under an Owner Controlled Insurance Program (OCIP), which consists of a single insurance policy issued by one insurance carrier, with the project owner(s), general contractor and subcontractors enrolled as insureds under the policy.

Considerations an attorney should keep in mind when procuring an OCIP insurance policy for a client or defending it under a particular OCIP for a claim, whether it be for personal injuries or violations of the standards set forth in Civil Code § 896, et seq., include:

- Who is the insurance carrier?
  Knowing the strengths and weaknesses of the carrier can give you insight into its longevity, handling of claims and whether undesirable policy provisions can be negotiated out.
- What type of project is being insured?
  Attorneys must know what type of project his or her client is involved with (whether it be a single family home, condominium, townhome, apartment, etc.) and whether the client intends to convert the project to something else in the future (e.g. apartments to condominiums).
- The policy may have a provision specifically excluding that type of project from coverage.
- Are other projects going to be covered by the policy? When defending a case, it is important to know if any of the other projects have been litigated and whether policy limits were depleted as a result.
  - Who can satisfy the self-insured retention (SIR)? Unlike a deductible, the SIR can and usually does, based upon policy language, exempt the insurer from its defense obligations until the SIR amount is paid by the named insured.
  - How is the SIR triggered or how many SIR’s must the named insured pay? Too often OCIP carriers are

Andrew P. Fiorica is a partner at Eppsteiner & Fiorica Attorneys, LLP. His practice over the last 15 years has focused on business and risk management advice for builders, developers, contractors and professionals involved in the construction industry as well as insurance procurement and litigation of construction related issues.

Bottom Line

Case Title | Pickard v. Scripps Memorial Hospital – La Jolla, et al.
Case Number | 37-2011-00098982-CU-MM-CTL
Judge | Hon. Lisa C. Schall
Plaintiff’s Counsel | Robert Bokelman and Neil Markowitz of Thorsnes Bartolotta McGuire
Defendant’s Counsel | Clark Hudson and Tamara Glaser of Neil, Dymott, Frank, McFall & Trexler, APLC
Type of Incident/Causes of Action | Medical Negligence (The lawsuit concerned an alleged failure of the defendants to diagnose ductal carcinoma in situ in 2008. Plaintiffs claimed this failure led to a delayed breast cancer diagnosis and unnecessary mastectomy and treatment for the patient.)
Settlement Demand | Initial demand was $1,000,000; immediately prior to trial, $400,000.
Settlement Offer | $75,000 to patient; waiver of costs to spouse
Trial Type | Jury
Trial Length | 10 days
Verdict | The jury returned an 11-1 defense verdict after deliberating for approximately 3 hours.
Cover Story Continued – Dealing With Difficult Lawyers

Be Willing to Lose a Few Battles, But Win the War

As difficult as it is to resist getting in the last word, especially when you know you are correct, let some things go. Not every point needs to be argued to the death and not every disagreement needs to be resolved on the spot. Some extension requests, or joint motion language, or deposition locations are important enough to be disputed, but many are not. Conserve your energy for the most important principles and the arduous litigation tasks still to come—you will need it. Simply agree to disagree and move on.

Kill Him/Her with Kindness

Nothing is so disarming as patience, kindness, and politeness, especially with someone to whom those are foreign concepts. It is almost impossible for even the most acerbic lawyer to continue snarling at an adversary who is visibly unperturbed and seemingly immune to the insults or ineptitude that would rattle most rivals. Remember, the sweetest payback is victory. Accomplish that with a smile.

Keep Your Eye on the Prize

Difficult lawyers often employ devious tactics to distract or frustrate an opponent, hoping you will just give up or give in. Regardless of the negative static and noise a difficult lawyer creates around the task or decision at hand, be it obtaining document production, eliciting deposition testimony, or complying with court rules and deadlines, tune it out. Never lose focus whether in a deposition, mediation, in court, on the phone, or sitting at your desk. Remain in control, with your attention firmly planted on your strategy, your objective, your goal. Ask yourself: what am I trying to do? What do I need to accomplish? Don’t let anyone or anything, especially the difficult lawyer, employ means that will distract you from those ends.

Always Take the High Road

Perhaps the biggest challenge when dealing with difficult lawyers is not responding in kind. As humans, it is very easy to be seduced into a shouting match, a slug fest, slinging a handful of mud. More effective, albeit often painful, is to bite your tongue [hard] and remain always above the fray. If you give in and allow Mr. Rambo (or Ms. Ramba) to drag you down to his level, he wins and you risk sanctions.

Document Everything

When lawyers have proven themselves unreliable, untrustworthy, and unable to conduct a civil conversation, you must protect yourself and your client by documenting what was said, done, and agreed to outside of the court or court reporter. Otherwise, you may be faced with a “he said-you said” debate about an important aspect of an issue or procedure. However, remember that any communication you author may wind up in front of the court, so be objective. State the facts and leave out any editorial content or petty afterthoughts.

Documentation can also be helpful to making a record of the difficult behavior itself. Commit to writing the abusive or inappropriate language used, or the promises broken. This may be needed down the road if you have a future need to involve the court or lodge a complaint. The fringe benefit is if a difficult lawyer realizes that you are keeping track of his behavior, it can serve as a nagging “conscience” and perhaps prevent future outbursts.

Recognize Bullies For Who They Are—Insecure Control Freaks

Unlike the guy who stole your lunch money in 5th grade, Joe Bully, Esquire often tries to excuse his conduct as zealous advocacy. He may even have convinced himself that he is simply doing his job. Strong arm tactics are especially problematic for new lawyers (and for females of all experience levels). Be vigilant. Keep your antennae up for the charming bully, the dishonest bully, and the Jekyll-Hyde bully. All will seek to exploit a lawyer’s lack of experience and/or confidence, and make you doubt and question yourself and your skills. All you need do is recall the undisputed facts: You went to law school. You passed the bar. You’ve likely been mentored by others whose quality as lawyers (and as people) is much higher than the bully you face. Remember, bullying in any context is often a mask for the bully’s own incompetence or insecurity. If possible, exude knowledge and confidence and determination, even if you are not feeling them.

Be prepared and prepare your client

Difficult lawyers generally are equal opportunity annoyances. They disrespect everyone, including witnesses and clients. A difficult lawyer may resort to sarcasm, innuendo, or outright aggression in a deposition, settlement conference, mediation or other meeting. If you know the facts, the rules, and the law, you will be able to counter bluster with brilliance. Preparation breeds confidence, which is exactly what the difficult lawyer seeks to attack or undermine. You may not be able to prevent all incendiary statements or actions, but you can blunt them by preparing your witnesses and clients. Advise them in advance what to expect, and direct them not to engage a difficult lawyer on his (low) level. Your client’s composure and professionalism, or that of the witness, will sap from the encounter most of the fun the difficult lawyer planned to have.

Don’t take it personally

Although this is much easier said than done, it is key to staying sane in today’s rough and tumble litigation arena. What people say about you may say more about them than it does about you. In many circumstances, the venom, lack of
cooperation, and incompetence on the part of opposing counsel that is making your life difficult may have nothing to do with you, or nothing to do with the lawsuit. If you can, pity the difficult lawyer. Remember what Gazzo said to Rocky Balboa in 1976 after an egregious insult about his appearance: “Look, Rocky, some people just hate for no reason.” And some of those people are lawyers.

**Address Communication Breakdowns in Real Time**

Do not accept rude or inappropriate conduct even for a moment. If opposing counsel is screaming, swearing, or threatening over the phone now, it will only go downhill later. At the first use of profanity or disrespect by opposing counsel, communicate that you demand to be treated with respect and civility. If it continues, calmly inform the caller that you are concluding the call and suggest that he call back when he is not so angry if he wishes to make progress on the issue. Alternatively, you always can exercise your personal power and autonomy to terminate the privilege of ever speaking with you by phone and instruct the difficult lawyer that all future communication be in writing.

Call the difficult lawyer out as it is happening. When possible, use appropriate phrases in a calm, collected tone:

“Thats not what I said”
“Thats not my question”
“Please let me finish”
“I think we’re actually saying the same thing”

Better yet, ask questions. Turning the tables on a naysayer is an effective means of revealing the fallacy in a rabid lawyer’s strong-minded, “I’m-always-right” statement with much less risk of confrontation. If he rejects or mocks everything you say, ask him what he would propose instead. You might elicit embarrassed (and golden) silence.

An attorney who follows these guidelines may avoid most negativity from a difficult adversary. If not, and if the interactions deteriorate and the behavior bulges well outside the bounds of decency, ethics, and professionalism, you may have no choice but to involve a third party, such as the court or a disciplinary commission, to reign in the offending attorney. There are various rules of civil procedure that address a difficult lawyer’s unacceptable conduct, such as unwillingness to cooperate in discovery, or that prevent behaving badly in deposition. In addition, there are Rules of Professional Conduct that prohibit incompetence, untruthfulness and other contumacious conduct. You should invoke these as a last resort, and be aware there is no guarantee sanctions or discipline will result. However, you owe it to yourself, your client, and the profession to ensure that the “good guys win” and that difficult lawyers realize that actions have consequences.

Jan Michelsen is a shareholder at Ogletree Deakins, in Indianapolis, Indiana. She concentrates her practice in counseling and defending management in employment discrimination litigation in federal and state courts and before regulatory agencies and provides training and counseling on a variety of labor and employment issues. She is a member of the Sagamore AIC and has previously served on the American Inns of Court Board of Trustees.

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The San Diego legal community has supported the charitable works of Father Joe’s Villages for 28 years through the annual Red Boudreau Dinner. The 2013 event was filled with tasty hors d’oeuvres and hosted drinks, lots of mixing and mingling, and a jazz band. In addition, the Bruderick Award and the Judge David R. Thompson New Lawyer Award (instituted in 2011) were presented. Congratulations to this year’s recipients Susan M. Hack & Dana M. Grimes.
**2013 COUTURE FOR A CAUSE**

**San Diego Legal Professionals Unite to Support Children in Need**

On Thursday, September 26, 2013, at 6:00 p.m., the San Diego Chapter of the Association of Legal Administrators, in partnership with the Southern California Chapter of the Legal Marketing Association, Lawyers Club of San Diego, the San Diego Paralegal Association, the San Diego Legal Secretaries Association, and the Mother Attorney Mentoring Association, hosted COUTURE FOR A CAUSE, a fashion show fundraiser at the San Diego Hall of Champions.

With Craig Higgs of Higgs, Fletcher & Mack as Master of Ceremonies, the evening featured models from throughout the legal community. Pre-show festivities included complimentary hors d’oeuvres, cash bar and a silent auction.

Proceeds from the event will benefit two children’s charities: Voices for Children, working to ensure that abused, neglected and abandoned children who have become dependents of the San Diego County Court will have a safe and permanent home; and STAR/PAL, empowering underserved youth to build a safer and more prosperous community by engaging with law enforcement and collaborative partners.

Find additional information the show at [www.coutureforacause-sd.org](http://www.coutureforacause-sd.org).

**Bottom Line**

**Case Title |** Estate of Shirley C. Giovacchini v Commissioner of Internal Revenue

**Case Number |** United States Tax Court Docket No. 2012-05

**Plaintiff’s Counsel |** Daniel M. White and Linda Sinclair of White, Oliver & Amundson; James L. Kelly of Reno, Nevada for Petitioner Estate of Shirley C. Giovacchini

**Defendant’s Counsel |** David Sorensen and Derek W. Kaczmarek of the Internal Revenue Service for Respondent Commissioner of Internal Revenue

**Causes of Action |** Respondent Commissioner claimed the Petitioner underreported and underpaid estate tax due on the sale of 2,500 acres of pristine ranchland above South Lake Tahoe in the State of Nevada to the United States Forest Service. Penalties for intentional and negligent underreporting were included in the Commissioner’s claims.

**Settlement Demand |** Over $20,000,000 in additional tax, including over $4 million in penalties.

**Settlement Offer |** None

**Trial Type |** Bench trial before Hon. Robert Wherry of the United States Tax Court

**Trial Length |** Three weeks

**Verdict |** The burden of proof (normally upon taxpayer) was shifted to the IRS on post-trial motion. The court’s decision eliminated all penalties and after deductions and set-offs, the additional taxes due were otherwise reduced for a total savings for the Petitioner of $15.6 million dollars.
The Dangerous Client: Protecting Your Practice From Problem People

By Dr. Steve Albrecht, PHR, CPP, BCC

The risk to lawyers from angry current or former clients or adversaries is not a new concern. Whether you work as a sole practitioner out of your own office or for a multinational firm in a downtown high-rise, the need for increased security to protect you from irrational or dangerous clients is ever-present. Some of these ideas are operational; some of them are informational. Choose what works best for your practice areas, typical clientele, office culture, and neighborhood.

Improve office access control policies and practices.

You don't need to give every attorney or staff member a photo ID badge, but it should not be easy to enter your office without going through a designated reception area. This idea should also lead you to create and enforce smart security policies in general: no unescorted visitors or vendors; side or exit doors should be kept locked; mail should be screened in a central location; file drawers, file rooms, and all computer server and telephonic or utility rooms should be kept locked when not in use; and shredders should be part of your information protection practices.

Train your gatekeepers in high-risk client management skills.

Businesses place significant responsibility on their receptionists. When it comes to handling difficult people, receptionists are the functional equivalent of psychologists, security guards, hall pass monitors, information providers, and the apologizing soothers of those with hurt feelings. Give these frontline foot soldiers your support, reasonable pay, praise, training, and guidance when it comes to their successful handling of high-risk clients. Create emergency procedures, like panic alarms, telephone, intercom, or even interoffice e-mail code words that help them alert you or other staff when they need help because a difficult client is in front of them.

Don't give out personal information to clients.

There's no need to be standoffish with clients, but you should also be aware of professional boundaries and not reveal information about your family, home or neighborhood, finances, travel schedules, or vacation plans. Angry clients with good social engineering skills can gather a lot of personal data from you or about you, from your unwitting staff, the Internet, or by manipulating others outside your office.

Watch for boundary probing behavior.

This includes overly-frequent e-mails and chronic phone calls, and more disturbingly, unannounced office visits. You should have significant concerns about irrational clients who have no further or legitimate business with you showing up without appointments, demanding to see you, or contacting you in the parking garage, your favorite restaurant (see above), or worse, at home.

Be aware of any pro per actions, malpractice threats, or civil orders involving clients.

Be ever mindful of whether clients or potential clients have a history of litigation and/or legal malpractice claims. Ascertain whether potential clients are lawyer-shopping and making frequent substitutions? Is this person on a first-name basis with the State Bar’s Complaint Department? Is the client named in one or more protective orders? Do your homework.

Track the comments, actions, or behaviors of irrational or threatening former clients.

Pay attention to stories of antisocial behavior involving former clients. Don't underestimate the value of gossip; it often has merit. Scan the local newspapers, talk to your colleagues, and pay attention to your surroundings as you go through your daily home and work routines. Was this person just arrested for a drug, alcohol, weapons, trespassing, or TRO violation? Have they been placed in a mental health facility for treatment? Have they threatened you indirectly or through other people? Have they targeted or harassed other attorneys or their staffs? Is there growing evidence of a mental illness issue? Did you learn of a “triggering event,” like a divorce, domestic violence, or a court decision against them? Have they just been hit with a termination of employment or benefits?

Evaluate every problem client contact for the threat potential.

If you have had a problem client, instruct your staff to bring all of this person's contacts to you, not just put them in a file or throw them away. This includes letters, photos, packages, gifts, or e-mail attachments. Does the person's words or language seem agitated or depressed? Do the current or former client's e-mails seem angry, rage-filled, and hostile, or are they morose, seething, and bleak? Do phone calls come in only during business hours or do you receive messages at 2:07 a.m., 2:11 a.m., and 2:13 a.m., all on the same day? Is there a spate of calls, messages, or e-mails and then months of no contact? Is the
former client issuing a demand, creating a cause, or making a threat? Do you see evidence of escalating behavior or concerned, afraid, or anxious about the behavior of a current or former client, call the police and discuss the issues

Two equations apply when it comes to understanding how current or former clients can turn homicidal toward attorneys:

Legal Issues + Courthouse or Law Office Visits + Emotional People = The Potential For Lethal Violence

&

Economic Stress + Mental Illness + The Need for Revenge = The Potential For Lethal Violence

comments, where the person is using self-created deadlines and “or else” language?

The best predictor of future bad behavior is past bad behavior.
People rarely undergo personality transplants. If the client is hostile, difficult, and entitled at the onset of the case, you can expect that pattern to persist throughout the middle of it, and on into the bitter end.

Get law enforcement help early.
Intuition, like hope, is a good thing. If you or members of your office feel with a patrol officer or deputy. He or she may have good advice about getting a restraining order, writing a “criminal threats” report (CA 422 PC), extra patrols in your area, or a security plan for your office or facility. You can also get good advice from DA investigators and other police or sheriff’s detectives as well.

Create a “safe room” for emergency situations.
Hollywood movie stars and politicians have the benefit of fortified safe rooms in their homes or work areas; you should create one for yourself and staff as well.

A safe room is a place where the members of your office can go in a life-threatening, people-problem emergency (an armed ex-client, ready for targeted, lethal violence), lock the door, call 911, and wait for law enforcement to arrive. Since you won’t usually have the luxury of a bullet-resistant fortress, any securable, windowless room will do. This includes break rooms, restrooms, file rooms, conference rooms, or any large office with a good lock. (Consider installing a peephole and a phone in any room you designate.) You may never need to use your safe room, or you could have to rush there tomorrow.

In these uncertain times, where angry clients think you are absolutely responsible for all their life problems, it helps to think and plan for the unthinkable.

Dr. Steve Albrecht is a San Diego-based consultant and trainer. He is board certified in HR, security, and coaching. In 1994, he co-wrote Ticking Bombs, one of the first business books on workplace violence prevention. He worked for the San Diego Police Department for 15 years. He can be reached at 619-990-2685 or drsteve@drstevealbrecht.com

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Dispute Resolution. It’s what we do and we take it personally.
Retirement Plan Fiduciary Responsibilities: Are You In Compliance?

By Mark Lee and Alex Nunes

The sponsor of a qualified retirement plan is responsible for compliance with detailed reporting, disclosure and general qualification requirements. These requirements are imposed by the Internal Revenue Code and the fiduciary responsibility provisions of the Employee Retirement Income Security Act of 1974 (“ERISA”). ERISA fiduciaries are often said to be charged with the “highest duty known to the law” and could face personal liability for breaches. Many plan sponsors assume that by selecting administrative service providers such as recordkeepers, actuaries, accountants, financial advisors and consultants, they have “outsourced” their fiduciary responsibilities and satisfied their obligations. Unfortunately, fiduciary duties can never be completely outsourced. Plan fiduciaries are responsible for selecting and monitoring service providers and could ultimately bear the responsibility for administrative or operational problems that may arise.

Now, more than ever, plan sponsors must understand their roles and fiduciary responsibilities in order to obtain the tax benefits of sponsoring a qualified retirement plan, help employees prepare for retirement and at the same time take steps to limit the liability associated with fiduciary status.

What is a fiduciary?

A fiduciary is generally a position of trust acting for the benefit of others with a high duty of care and loyalty. ERISA defines a fiduciary as any person to the extent he or she (1) exercises any discretionary authority or control over the management or disposition of a plan’s assets, (2) renders investment advice for a fee or other direct or indirect compensation with respect to plan assets, or has the authority or responsibility to do so, or (3) has any discretionary authority or responsibility in the administration of the plan.

ERISA fiduciaries could face personal liability for breaches of fiduciary duties. ERISA fiduciaries are charged with the following basic duties:

- Act solely in the interests of plan participants and beneficiaries with the exclusive purpose of providing benefits to them (“duty of loyalty”) and avoid prohibited transactions.
- Be prudent. Act with the care, skill, prudence and diligence of a person acting in a like capacity and familiar with such matters (the “prudent expert rule”). Hire experts where needed.
- Understand and follow the terms of the plan documents (unless inconsistent with ERISA) and make sure document provisions are up-to-date as required by current law.
- Diversify plan investments to minimize risk of large investment losses.
- Pay only reasonable and necessary expenses associated with the maintenance and administration of the plan.

Who is a fiduciary?

In general, an employer sponsoring a plan is identified as the “Named Fiduciary” under ERISA. The named fiduciary can be an individual or a committee and serves as the “fiduciary in chief” in charge of overall plan decision making, selection and monitoring of plan investments and service providers, participant education and communication, and day-to-day plan administration and compliance.

The Named Fiduciary can delegate fiduciary responsibilities to service providers who may or may not act in a fiduciary capacity.

For example, an insurance company providing a group variable annuity product used to fund a 401(k) plan can be viewed as a “product manufacturer”. The product manufacturer is typically not a fiduciary to the plan, but in addition to its role as the insurer bearing the risk under the contract, may provide various services related to the contract and plan (e.g. recordkeeping and administration).

In selecting that product manufacturer, a plan sponsor has delegated these responsibilities to the insurer. Despite the delegation, the Named Fiduciary always retains the “fiduciary duty to monitor” service providers, basically to review periodically to make sure the services remain necessary and appropriate, the arrangement with the service provider is still appropriate for the plan and that the service provider is delivering services per the contractual service arrangement and fees are reasonable. If a chosen service provider does not perform as promised and there is resulting harm or loss incurred by the plan, the Named Fiduciary is ultimately responsible to the plan and its participants, but has whatever recourse is available under the contractual arrangements with its chosen service providers. The importance of prudent selection and monitoring of service providers is critical.

The role of “advisor” is another example of the Named Fiduciary’s delegation of responsibility to a service provider. Although some will accept a fiduciary role, most advisors do not assume a fiduciary role under ERISA, but rather operate under a suitability standard for the consulting services provided to the plan to assist the Named Fiduciary with the monitoring and ongoing administration (like a...
“quarterback”). Plan sponsors should carefully review service and engagement agreements to determine the fiduciary or non-fiduciary status that service providers will assume.

The Named Fiduciary typically delegates trustee responsibilities. The “Trustee” of a plan is a term often confused with the “Named Fiduciary”. The trustee of a plan is responsible for safekeeping of plan assets. In some cases, a plan trustee will also serve as the plans Named Fiduciary. Today, however, many trust arrangements under defined contribution plans are “directed trustee” relationships where the trustee has some fiduciary responsibility in that it must hold plan assets for the exclusive benefit of plan participants and beneficiaries. A directed trustee will take direction from the Named Fiduciary and/or any investment manager retained by the named fiduciary (for example, where an independent third party is engaged as a discretionary investment manager). The Trustee also takes direction from plan participants where they are allowed to direct the investment of their plan accounts.

There are a number of different service arrangements available in the defined contribution marketplace. Some services are offered by a single provider on a “bundled” basis, while others involve arrangements with several different service providers. Other arrangements may be structured somewhere in between. Plan sponsors need to be aware of their roles and responsibilities as well as the roles and responsibilities of the service providers they choose. An informed plan sponsor with strong, trusted partners can successfully navigate through ERISA requirements and work to develop processes and procedures that are designed to facilitate successful plan operation while limiting exposure to fiduciary liability.

**Are you a fiduciary?**

An important first step in that process is to determine your level of fiduciary awareness and take the necessary steps to bring you and your colleagues up to speed. Consider the following “Fiduciary Five” questions:

1. Do you know who the fiduciaries of your plan are?
2. Do the fiduciaries of your plan know that they are fiduciaries?
3. Do the fiduciaries of your plan know their responsibilities under ERISA?
4. Do you have a “fiduciary structure” that outlines the roles and responsibilities of each fiduciary, establishes administrative and/or investment committees and a system for the delegation of duties?
5. Do established and documented processes exist to demonstrate compliance with fiduciary responsibilities under ERISA?

If you are unable to answer “yes” to all of the “Fiduciary Five” questions, consider the following five-step process as an important first step towards complying with fiduciary responsibilities and protecting from liability.

**Action Steps**

Work with a retirement plan professional to assess your current level of fiduciary compliance, identify gaps and utilize “best practices” to address those gaps. It’s easy to remember…just think “E-R-I-S-A!”

**Step One – Educate**

Arrange a training session with an ERISA expert and your plan fiduciaries to explain ERISA’s fiduciary responsibility provisions and discuss common misconceptions, industry trends and best practices.

**Step Two – Review**

Review current practices, identify gaps, and develop action steps, processes, and procedures.

**Step Three – Implement-Decide & Delegate**

Implement a “fiduciary structure” with appropriate documentation (e.g. board resolution, committee charter, delegation of duties and fiduciary acceptance documents).

**Step Four – Stay on Track - Follow Established Processes**

Use tools and checklists to help you follow established processes and maintain consistency in carrying out fiduciary responsibilities.

**Step Five – Always Document Decisions**

Be sure to keep clear documentation of all meetings, discussions and information used to make fiduciary decisions.

**Continuous Improvement**

Wherever you find yourself on the fiduciary scale today, there is always room for improvement. An understanding of basic fiduciary principles and roles is an important starting point in developing an appropriate framework to manage potential liability while operating a successful plan to achieve the multiple goals of attraction and retention of employees, preparing those employees for retirement and benefiting from the ability to make tax-deductible employer contributions.

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Over 100 players joined SDDL at the Rancho Bernardo Country Club on July 26, 2013 to raise money for Juvenile Diabetes Research Foundation. The guests were welcomed by the friendly staff at CCRB and escorted to the vodka bar and invited to lounge at the beer garden. After lunch, the eager players began the tournament and played the pristine course. “It was a gorgeous day at the Club and a fun tournament, with great hole-sponsors and raffle prizes” said Alan Brubaker, SDDL Member and golf participant.

During the tournament, SDDL members and guests enjoyed refreshing margaritas, beer, whiskey and other specialty drinks at each hole, provided by the sponsors. Players were even greeted by the Polar Bear from The Baked Bear who offered homemade ice cream sandwiches.

The evening concluded with a delicious dinner and raffle prizes. Attendees won golf clubs, restaurant gift certificates, weekends away, a camera, Apple TV and much more. “Our goal was to have a great time and raise as much money as we could for Juvenile Diabetes Research Foundation. Based on the feedback from our members and the preliminary numbers, we definitely achieved both” said Ben Howard, current SDDL President. SDDL will be able to make a larger donation than last year to Juvenile Diabetes Research Foundation!

SDDL thanks the following sponsors and encourages our members to continue to support the sponsors as they have consistently supported SDDL.

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ESI
Heather Rosing, Shareholder and Chief Financial Officer of the San Diego-based firm Klinedinst PC, has been recognized in the 2013 edition of San Diego Super Lawyers as the third-highest ranking attorney for all of San Diego County. Ms. Rosing made the Top 10 and Top 50 San Diego Super Lawyers lists, as well as Top 25 Women Super Lawyers in San Diego.

Judy Bae was named by the San Diego Daily Transcript as a Top Attorney in the field of Estate Planning/Probate & Trust/Tax. Her practice area is now mainly in estate/trust litigation matters but Ms. Bae has remained an SDDL member and supporter since she first started practicing in insurance defense as a young attorney.

In August, Michael D. Washington and Pamela M. Parker were appointed to the San Diego Superior Court by Governor Jerry Brown.

Prior to his appointment, Judge Washington was a long-time deputy public defender who has also taught as an adjunct professor at the University of San Diego School of Law and at the Thomas Jefferson School of Law. Judge Parker filled the vacancy created by the retirement of Judge Luis R. Vargas.

Brad Lebow recently joined the San Diego firm Butz Dunn & DeSantis, APC, where his practice focuses on complex business litigation, including class actions, contract disputes, and healthcare-related issues. Mr. Lebow previously practiced at the San Diego office of Cooley LLP. Mr. Lebow is a graduate of UCLA Law School, where he was an editor on the UCLA Law Review. He resides in Encinitas with his wife and three children.

The December 2012 Welsh Inn of Court Team recently received an Outstanding Program Award from the national office of the American Inns of Court. The program, entitled “Failed Settlement, Misrepresentation and Confidentiality,” focused on the mediation privilege’s impact on motions to enforce settlements and on prosecuting and defending legal malpractice claims. The December 2012 Team, comprised of Hon. Melinda J. Lasater, Douglas M. Butz, Virginia C. Nelson, Elizabeth A. Smith-Chavez, Hon. Charles R. Hayes, Robert G. Steiner, James A. McFaul, Virginia L. Price, Kyle E. Yaege, Andre M. Espinosa, Britton Lacy, Jeffrey W. Speights, and Karen Oakman, has also been invited to present their program to the Enright Inn of Court on February 20, 2014.

Case Title | Wendy Peiffer v. Snow & Shapley Dental Office, Inc. et al.
Case Number | San Diego Superior Court 37-2011-00100607-CU-OE-CTL
Judge | Hon. Judith F. Hayes
Plaintiff’s Counsel | Joshua D. Gruenberg and Susan M. Swan-Gruenberg Law
Defendant’s Counsel | Bruno W. Katz-Wilson Elser Moskowitz Edelman & Dicker LLP
Type of Incident/Causes of Action | Employment Litigation/Constructive Discharge in Violation of Public Policy and Intentional Infliction of Emotional Distress
Settlement Demand | Confidential (Demand for $500,000 in closing argument)
Settlement Offer | Confidential
Trial Type | Jury
Trial Length | 5 days
Verdict | Defense Verdict 11-1 Constructive Discharge in Violation of Public Policy, 12-0 Intentional Infliction of Emotional Distress
New CA Supreme Court Opinion
Re: Multiple 998 Offers

By Brittany Bartold
LEWIS BRISBOIS BISGAARD & SMITH LLP

On June 10, 2013, the California Supreme Court, in Martinez v. Brownco Construction Co., Inc. (June 10, 2013, S200944) ___Cal.4th ___, analyzed whether a subsequent offer extinguishes a previous offer for purposes of Code of Civil Procedure section 998’s cost-shifting provisions. (Slip opn., p. 2.) The Supreme Court held that where “a plaintiff serves two unaccepted and unrevoked statutory offers, and the defendant fails to obtain a judgment more favorable than either offer, the trial court retains discretion to order payment of expert witness costs incurred from the date of the first offer.” (Id. at p. 14.)

Plaintiffs, Mr. and Mrs. Martinez, sued defendant Brownco Construction Company, Inc. (“Brownco”) for damages arising out of an electrical explosion that severely injured Mr. Martinez. (Slip opn., p. 2.) Prior to trial, plaintiffs each served on Brownco two settlement offers pursuant to Code of Civil Procedure section 998. Mr. Martinez offered to compromise his negligence cause of action for $250,000. Brownco failed to accept his first settlement offer, but before her first offer was consistent with the language of section 998 and best promotes the statutory purpose to encourage settlements. (Slip opn., pp. 2, 12.)

According to the court, the purpose of encouraging settlement “would be more fully promoted if the statutory benefits and burdens were to operate whenever the judgment or award is not more favorable than any of the statutory offers made.” (Id. at p. 12.) The court explained that “if the statutory benefits and burdens were to run only from the date of the last offer in circumstances such as these, plaintiffs may be deterred from making early offers or from later adjusting their demands.” (Ibid.) Further, contract law did not require divestment of the statutory benefit of expert fees simply because a party makes a later offer. In addition, the court noted that “if a later offer results in mischief or confusion, or any gamesmanship appears, the court may address such concerns when considering what postoffer expert fees to award.” According to the court, “the discretion conferred upon trial courts suffices as a meaningful check against mischief and gamesmanship.” (Id. at p. 15.)

Further, the Supreme Court examined the last offer rule as applied in Wilson and Distefano v. Hall (1968) 263 Cal.App.2d 380. (Slip opn., p. 7.) According to these cases, “any new offer communicated prior to a valid acceptance of a previous offer, extinguishes and replaces the prior one.” (Distefano, supra, 263 Cal.App.2d at p. 385.) The Supreme Court was not persuaded that application of the last offer rule was mandated in all multiple offer situations. (Slip opn., p. 11.) The court noted that the last offer rule might have been appropriate in Distefano and Wilson where an offeree obtains a judgment or award less favorable than a first section 998 offer, but more favorable than the later offer. (Id. at pp. 13-14.) The present circumstances, however, called for a different result. (Id. at p. 14.) In the Martinez case, the plaintiff made statutory offers and defendant failed to obtain a judgment more favorable than either. According to the court, “[u]nder these circumstances, section 998’s policy of encouraging settlements is better served by not applying the general contract principle that a subsequent offer entirely extinguishes a prior offer. Not only do the chances of settlement increase with multiple offers . . . but to be consistent with section 998’s financial incentives and disincentives, parties should not be penalized for making more than one reasonable settlement offer. Nor should parties be rewarded for rejecting multiple offers where each proves more favorable than the result obtained at trial.” (Ibid.) As a result, Mrs. Martinez was not precluded from recovering expert witness costs she incurred between the dates of her first and second settlement offers. (Id. at p. 13.)
Summary of Recent Civil Cases of Interest

By Monty A. McIntyre, Esq.
Seltzer Caplan McMahon Vitek

U.S. SUPREME COURT
Constitution/Civil Rights
Shelby County, Alabama v. Holder _ U.S. _ (2013): The U.S. Supreme Court reversed the District of Columbia Circuit Court of Appeals. Section 4 of the Voting Rights Act of 1965 is unconstitutional because of the failure of Congress to update the coverage formula. The Fifteenth Amendment commands that the right to vote shall not be denied or abridged on account of race or color, and it gives Congress the power to enforce that command. The Amendment is not designed to punish for the past; its purpose is to ensure a better future. To serve that purpose, Congress - if it is to divide the States - must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions. It cannot rely simply on the past. (June 25, 2013.)

Employment/Labor
University of Texas Southwestern Medical Center v. Nassar _ U.S. _ (2013): The U.S. Supreme Court reversed the Fifth Circuit Court of Appeals and remanded for further proceedings. The text, structure, and history of Title VII demonstrate that a plaintiff making a retaliation claim under section 2000e3(a) must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer. (June 24, 2013.)

Vance v. Ball State University _ U.S. _ (2013): The U.S. Supreme Court affirmed the judgment of the Seventh Circuit Court of Appeals. An employer may be vicariously liable for an employee’s unlawful harassment under Title VII only when the employer has empowered that employee to take tangible employment actions against the victim, i.e., to effect a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. (June 24, 2013.)

Family
Hollingsworth v. Perry _ U.S. _ : The U.S. Supreme Court vacated the decision of the Ninth Circuit Court of Appeal because petitioners did not demonstrate standing to appeal the judgment of the district court. The Ninth Circuit was without jurisdiction to consider the appeal. The judgment of the district court, finding California’s Proposition 8 unconstitutional and enjoining the enforcement of Prop. 8, is now the final judgment. (June 26, 2013.)

United States v. Windsor _ U.S. _ : The U.S. Supreme Court affirmed the Second Circuit Court of Appeal. The Defense of Marriage Act (DOMA) singles out a class of persons deemed by a state entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the state finds to be dignified and proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is in violation of the Fifth Amendment. (June 26, 2013.)

Torts/Product Liability
Mutual Pharmaceutical Company, Inc. v. Bartlett _ U.S. _ (2013): The U.S. Supreme Court reversed the decision of the First Circuit Court of Appeal. State-law design-defect laws that effectively require generic drug manufacturers to change generic drug labeling to provide stronger warnings in violation of federal law prohibiting generic drug manufacturers from independently changing their drug labels are preempted by federal law under PLIVA, Inc. v. Mensing, 564 U. S. ___ (2011). (June 24, 2013.)

9th CIRCUIT COURT OF APPEAL
Insurance
City of Buenaventura v. Insurance Company of the State of Pennsylvania _ F.3d _ : The Ninth Circuit Court of Appeals affirmed the district court’s summary judgment for the defendant carriers. The district court properly found no coverage under the policies because they were issued after the occurrence that led to the underlying litigation. The condominium buyers’ complaints allege that they were damaged by the City’s negligence when they purchased their units in early 2001, over a year before the 2002-2003 Great Lakes policy and two years prior to the 2003-2004 Insurance Company of the State of Pennsylvania policy. They do not allege that they were wrongfully damaged by the City’s affordable housing program, or that the program was in any way unlawful. They merely ask that the program be suspended as to them because of the City’s 2001 negligence. Also, both policies expressly exclude coverage for declaratory or

continued on page 16
injunctive relief, so those claims by the condominium buyers cannot provide a basis for duties to defend or indemnify. (June 26, 2013.)

CALIFORNIA SUPREME COURT
Family
In re Marriage of Green (2013) _ Cal.4th _ : The California Supreme Court reversed the Court of Appeal and affirmed the trial court order requiring the husband to pay the wife one-half of the amount, plus interest, that the community expended to obtain additional retirement credit for the husband’s premarital military service. What matters in determining whether retirement benefits are community or separate property is the person’s marital status when the services on which the benefits are based were rendered. Because the husband rendered the military service before the marriage, the California Supreme Court concluded that, except for the community’s contribution to the cost of obtaining the credit, the four years of additional credit were the husband’s separate property. (June 24, 2013.)

CALIFORNIA COURTS OF APPEAL
Arbitration
Roberts v. Packard, Packard & Johnson (2013) _ Cal.App.4th _ : The Court of Appeal reversed the trial court’s award of attorney fees to defendant after it prevailed on a motion to compel arbitration. Because only one side - plaintiffs or their former attorneys - can prevail in enforcing the contingency fee agreement in question, the determination of the prevailing parties must await the resolution of the underlying claims by an arbitrator. Attorney fees can be awarded only to the parties that prevail in the “action.” (See Civil Code section 1717(a), (b)(1).) The trial court erred in awarding interim attorney fees to the former attorneys for filing a successful petition to compel arbitration. (C.A. 2nd, July 3, 2013.)

Attorneys
DeLuca v. State Fish Co., Inc. (2013) _ Cal.App.4th _ : The Court of Appeal reversed the trial court’s granting of a motion to disqualify plaintiff’s counsel. Plaintiff informed defendant he would be using an expert witness who had testified on behalf of the defendant in a prior trial of issues between the parties. Defendant objected on the ground the expert possessed confidential attorney-client and work-product information learned when retained on behalf of the defendant. The defendant moved to disqualify plaintiff’s counsel from further representing plaintiff on the basis that plaintiff’s counsel had obtained access to the confidential information possessed by the expert. The trial court granted the motion and disqualified plaintiff’s counsel. The Court of Appeal, however, concluded that defendant failed to satisfy its burden of establishing that the expert possessed confidential information material to the pending proceedings. (C.A. 2nd, June 27, 2013.)

Brown Bark III, L.P. v. Haver (2013) _ Cal.App.4th _ : The Court of Appeal reversed the trial court’s denial of defendant Westover Capital’s attorney fee motion regarding a breach of contract cause of action. Plaintiff would have recovered its attorney fees if it had prevailed on its successor liability theory against Westover Capital because the line of credit contracts made its fee provisions binding on the contracting parties’ successors. Section 1717 therefore allowed Westover Capital to recover its attorney fees because it defeated claims for breach of the line of credit contracts that would have exposed Westover Capital to attorney fee liability had it lost. Section 1717 only applies to contract causes of action, however, so the Court of Appeal affirmed the trial court’s order denying Westover Capital attorney fees on the tort causes of action. (C.A. 4th, filed August 26, 2013, published September 13, 2013.)

Business
Charter Township of Clinton Police and Fire Retirement System v. Martin (2013) _ Cal.App.4th _ : The Court of Appeal affirmed the trial court’s sustaining of a demurrer to a shareholder derivative complaint, finding that plaintiffs failed to allege facts excusing pre-suit demand on the Board of Directors with allegations of particularized facts showing wrongdoing by a majority of directors on a director-by-director basis. In reaching this conclusion, the Court of Appeal agreed with and cited in detail from the recent opinion in Raul v. Rynd (D. Del., Mar. 14, 2013, C.A. No. 11-560-LPS) U.S. Dist. LEXIS 35256 (Rynd), which dismissed a complaint containing allegations strikingly similar to those against defendants in this case for failure to allege pre-suit demand futility. (C.A. 2nd, September 17, 2013.)

Civil Procedure
Chavez v. Indymac Mortgage Services (2013) _ Cal.App.4th _ : The Court of Appeal reversed the trial court’s sustaining of a demurrer without leave to amend. A lender mailed a homeowner a loan modification agreement under the Home Affordable Mortgage Program. The homeowner signed, returned and performed under the loan modification agreement. The lender, however, never mailed the homeowner a signed copy of the loan modification agreement. The Court of Appeal concluded that the homeowner sufficiently alleged equitable estoppel to preclude the lender’s reliance on the statute of frauds defense, and sufficiently alleged a cause of action for wrongful foreclosure. (C.A. 4th, September 19, 2013.)

Macaluso v. Superior Court (Lennar Land Partners II, LLC) (2013) _ Cal.App.4th _ : The Court of Appeal reversed the trial court and concluded that the trial court’s order compelling further responses and production of documents at a judgment debtor examination was an appealable order under Code of Civil Procedure section 904.1(a)(2). (C.A. 4th, September 18, 2013.)
Real Property/CEQA/Land Use/Environment/Homeowners Association

Wittenberg v. Beachwalk Homeowners Association (2013) _ Cal.App.4th _ : The Court of Appeal reversed the trial court's denial of a writ petition seeking to void an election to amend bylaws. The trial court erred in ruling that, under Civil Code 1363(a)(1), the homeowners association board did not have to give members with opposing viewpoints equal access to media used by the board to explain its actions. The trial court also erred in finding that the board did not violate Civil Code section 1363.03(a)(2) when it did not permit free access to common areas for purposes reasonably related to an election. On remand, the trial court should consider both violations in deciding whether an election to amend the bylaws needed to be voided. (C.A. 4th, June 26, 2013.)

Torts/Personal Injury/Wrongful Death

Cann v. Stefanice (2013) _ Cal.App.4th _ : The Court of Appeal affirmed the trial court’s summary judgment for defendant. The trial court properly ruled that the primary assumption of risk doctrine applied to this situation where plaintiff was injured after her UCLA swim team teammate/defendant dropped weights when she lost her balance. The Court of Appeal found that weight lifting involves an inherent risk of injury to persons in the vicinity of lifters who drop weights because of a loss of balance, injury suffered during a lift, or other reasons. Because weight training involves the risk that the weight will be dropped, defendant’s conduct after she lost her balance was not totally outside the range of ordinary activity of the sport. (C.A. 2nd, June 24, 2013.)

Aspiras v. Wells Fargo Bank, N.A. (2013) _ Cal.App.4th _ : The Court of Appeal affirmed the trial court’s dismissal of plaintiff’s complaint against Wells Fargo Bank alleging fraud, negligent misrepresentation and violation of the Unfair Competition Law after plaintiff declined to amend the complaint following the sustaining of a demurrer with leave to amend. The Court of Appeal asked the parties to brief the application, if any, of Jolley v. Chase Home Finance, LLC (2013) 213 Cal.App.4th 872 (Jolley). The Court of Appeal declined to follow Jolley because Jolley was a construction loan but this case was not and the handling of loan modification negotiations or servicing is a typical lending activity that precludes imposition of a duty of due care. (C.A. 4th, filed August 21, 2013, published September 17, 2013.)

Moradi v. Marsh USA, Inc. (2013) _ Cal.App.4th _ : The Court of Appeal reversed the trial court’s summary judgment for defendant in a personal injury action. Because the employer required the employee to use her personal vehicle to travel to and from the office and make other work-related trips during the day, the employee was acting within the scope of her employment when she was commuting to and from work. The planned stops for frozen yogurt and a yoga class on the way home did not change the incidental benefit to the employer of having the employee use her personal vehicle to travel to and from the office and other destinations. On the day of the accident, the employee had used her vehicle to transport herself and some coemployees to an employer-sponsored program, and the employee had planned to use her vehicle the next day to drive to a prospective client’s place of business. Under the “required vehicle” exception to the “going and coming” rule, the employee was acting within the scope of her employment at the time of the accident. (C.A. 2nd, September 17, 2013.)

Moreno v. Quemuel (2013) _ Cal.App.4th _ : The Court of Appeal affirmed the trial court’s summary judgment for defendant, a LA County deputy sheriff. When a peace officer opens his or her door as a precursor to exiting a patrol car and making contact with a deputy sheriff. When a peace officer opens his or her door as a precursor to exiting a patrol car and making contact with a motorist during a traffic stop, the peace officer is in “immediate pursuit of an actual or suspected violator of the law” for purposes of the immunity set forth in Vehicle Code section 17004. In that situation, the peace officer cannot be held liable for opening his or her door in the path of a motorcyclist and causing injury. (C.A. 2nd, September 17, 2013.)

Sanders v. Walsh (2013) _ Cal.App.4th _ : The Court of Appeal affirmed a bench trial judgment for plaintiff in an action for libel, false light, and intentional and negligent infliction of emotional distress arising from internet postings by defendant. The Court of Appeal found that the trial court erred in applying collateral estoppel to prevent defendants from introducing evidence supporting their claim that plaintiff had produced a fraudulent letter in a prior small claims action, but ruled this error was harmless. (C.A. 4th, September 16, 2013.)

Insurance

Mount Vernon Fire Insurance Corporation v. Oxnard Hospitality Enterprise, Inc. (2013) _ Cal.App.4th _ : The Court of Appeal affirmed the trial court’s summary judgment for defendant. This appeal involved the interpretation of the term “physical contact” in an insurance liability policy’s “Assault or Battery” exclusion. In an underlying action the trial court entered a $10 million stipulated judgment in favor of plaintiff Roberta Busby against her employer, Oxnard Hospitality Enterprise, Inc. and others for negligence after she sustained serious bodily injuries when a third party threw a glass full of a flammable liquid on her and set her on fire. Oxnard’s liability carrier Mount Vernon Fire Insurance Company sought a declaratory judgment that it had no duty to indemnify Oxnard and/or its owners, nor to pay any claim of Busby or her minor children arising from this incident, relying on the policy’s “Assault or Battery” exclusion. The term “battery,” as used in that exclusion, is defined as “physical contact with another without consent” (italics added). The Court of Appeal rejected Busby’s argument that the definition required a direct “body-to-body” contact and instead concluded that it necessarily included a striking or touching as occurred in Busby’s case. (C.A. 2nd, September 16, 2013.)

SDDL thanks Monty McIntyre for providing these updates. He can be reached at monty.mcintyre@gmail.com or www.montymcintyre.com.
On October 1, 2013, the Court of Appeal, Fifth Appellate District (Fresno) issued an opinion in *Halliburton Energy Services, Inc. v. Department of Transportation* (Oct. 1, 2013, F064888) holding that “there is no respondeat superior liability if the employee substantially departs from the employer’s business or is engaged in a purely personal activity at the time of the tortious injury.” (Slip opn., p. 10.)

Plaintiff Martinez was employed by Halliburton as a directional driller. He was assigned a company pickup truck to drive. He was told he could use the company vehicle to get to work and back and to run personal errands that were directly on route. (Slip opn., p. 2.) In September 2009, Martinez was assigned to work on an oil rig near Seal Beach. The job was expected to take two to three weeks. (Id. at p. 3.) Martinez worked a shift that began at 9:00 p.m. on September 12, 2009 and ended at 9:00 a.m. on September 13, 2009. After his shift on the oil rig ended that morning, he got in the company pickup, and traveled approximately 140 miles to Bakersfield, where he met his wife and daughter at a car dealership to purchase a vehicle for his wife. The deal fell through and Martinez and his family went to a restaurant and had lunch. Martinez then began the return trip to his hotel in Seal Beach, where he planned to eat while he waited for the boat back to the oil rig for his 9:00 p.m. shift. Approximately 20 miles south of Bakersfield, he was involved in an accident. (Ibid.) The injured drivers alleged a negligence cause of action against Martinez and Halliburton. The trial court granted Halliburton’s summary judgment motions. (Id. at p. 4.)

The Court of Appeal affirmed. The court held that “the incidental benefit exception to the going and coming rule may bring the employee’s commute to and from work within the scope of the employee’s employment, if the employee does not deviate substantially from a direct commute in order to carry out his own personal business. The exception does not apply, however, if the employee substantially departs from his or her employment duties during the commute. It also does not apply if the employee’s entire trip serves only his or her own personal purposes.” (Slip opn., pp. 16-17.) The court concluded that Martinez was departing substantially from his commute and his job duties at the time of the accident. Further, there was no necessary nexus between Martinez’s activities at the time of the accident and Halliburton’s business enterprise. As a result, the trial court correctly determined that Halliburton could not be held liable to plaintiffs on a respondeat superior theory. (Id. at p. 21.)

Further, the court cited the recent case of *Moradi v. Marsh USA, Inc.* (Sept. 17, 2013, B239858) holding that “there is no respondeat superior liability if the employee substantially departs from the employer’s business or is engaged in a purely personal activity at the time of the tortious injury.” (Id. at p. 13, fn. 2 citing Moradi, supra, at pp. *41, 53-54.) Here, by contrast, Martinez’s purpose in traveling to and from Bakersfield on the day of the accident was entirely personal. He finished his shift and drove the company truck 140 miles to Bakersfield where he intended to meet his wife at a car dealership and sign papers to purchase a vehicle for her. He was not performing services or running errands for his employer. The trip was not made in the furtherance of any business activity of the employer. Thus, “[t]he risk of a traffic accident during this personal trip was not a risk inherent in or ‘typical of or broadly incidental to’ Halliburton’s enterprise.” (Slip opn., p. 17 quoting *Bailey v. Filco, Inc.* (1996) 48 Cal.App.4th 1552, 1558-1559.)
How To More Effectively Use an Expert Witness

By Ron Whitehead, Esq.

As technology advances, so does the need to retain an expert witness. Gone are the days when a simple traffic accident could be resolved by presenting facts to a jury that a defendant ran a red light, hit and injured a plaintiff. A defendant now looks to shift the blame or lessen the exposure by presenting alternate and/or additional theories. Examples: The vehicle manufacturer installed a braking system, where the calibers were insufficient, causing the brakes to overheat and fail. The City’s traffic light did not show yellow for a sufficient amount of time before turning red. The plaintiff’s mold growth in the inner ear was not related to the airbag going off (actual case).

Each of these theories will require the retention of experts to provide opinion testimony to a jury. Experts such as an accident re-constructionist, traffic engineer, vehicle forensic engineer/mechanic, and an anatomical and molecular pathologist.

Today, litigation attorneys must be able to work with not only one expert witness, but oftentimes a team of experts, who each provide relevant testimony to satisfy the applicable burden of proof. How attorneys and experts interact and work together is not only critical to preparing the case for trial, but it is often the determinative factor in becoming the prevailing party. Below are some key elements that can assist in making that relationship between the attorney and the expert a success.

Get a Budget.
Ask the expert to provide a budget soon after retention, one that is detailed, reasonable, and a little generous. The main reason for this is to present the budget to the client, who can then make informed decisions on settlement value and expectations of the costs of litigation. The last thing the attorney or expert wants is to have a bill presented to a client for payment and have the client refuse to pay on the grounds that the services were not authorized or that they are unable to pay due to inadequate reserves.

Involve the Expert Early.
Experts can provide additional insights or new alternative opinions that can not only assist in winning a case, but are often the key deciding factors. By involving the expert early, the expert is able to formulate these opinions at the early stages of litigation, at which point they can help steer the strategy of the case. The attorney and client are able to save time, resources, and costs.

Provide Timely Information.
The attorney may be doing the client a disservice if documents and/or deposition transcripts are held back from the expert on the belief that the case may resolve early, thus saving the client money. By holding back the information until the day before deposition, the expert must then rush through it all and has a greater chance of missing something that may be decisive to the case. In addition, by allowing the expert to review and absorb the information over a longer period of time, the expert may think of and present additional ideas, which may assist the attorney in the case.

Prepare Thoroughly for Deposition.
How effectively the expert performs during the deposition can affect the value and success of the case. The axiom “that an attorney should never ask a question at trial that he/she does not already know the answer” holds true for the expert deposition as well. The attorney should always know the answer to every pertinent question from their own expert. In addition, by preparing the expert for deposition, the attorney can help the expert avoid or circumvent those “trouble” areas.

Weigh the Costs and Qualifications.
The adage that “you get what you pay for” applies with experts as well. Although the cost of the expert usually coincides with his or her qualifications, an expert that is articulate, can explain technical concepts well, and presents himself/herself in a likeable manner is usually the one believed by the jury.

When the need for opinion testimony is a critical element in a case, knowing how to most effectively use the expert becomes a necessity. When the attorney effectively uses the expert by following these recommendations, the attorney, expert, and client all benefit, with the result being better prepared for trial and most likely a better result at trial.

Ron Whitehead, Esq. currently works as Director of Operations and House Counsel for Xpera Group, a construction consulting firm with over 50 experts in California. He worked for over 13 years as a civil defense attorney and over nine years as a claims adjuster for a major national insurance company. ■
Dollar Cost Averaging: A Strategy to Help You Lower the Average Cost of Your Investments

By Zachary MacDougall *

Certainly, the individual investor cannot be expected to properly “time” specific securities purchases and sales with consistent success.

Dollar Cost Averaging is a method that helps to maximize the opportunity to buy low. To be more specific, Dollar-Cost-Averaging enables you to buy, over time, shares of a security at an average cost which is less than the average price. More importantly, it greatly reduces the risk that you’ll invest all or the majority of your assets at or near a market high.

It may sound too good to be true, but Dollar-Cost-Averaging really can work. All it requires is a commitment on your part to invest a fixed amount of money into the investment of your choice at regular intervals. The result is that you’ll buy more shares when the price is low and fewer shares when the price is high. The example below illustrates this concept:

<table>
<thead>
<tr>
<th>Month Purchased</th>
<th>Investment Amount</th>
<th>Share Price</th>
<th>Shares Purchased</th>
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<tr>
<td>January</td>
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<tr>
<td>Totals</td>
<td>$6,000</td>
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Average Share Price = $40.83
Your Average Cost Per Share = $38.70
Difference/Savings Per share = $2.13

The figures shown below are for illustrative purposes only and don’t reflect any actual performance of any particular investment.
comfortable trying to time the marketing in pursuit of maximum gains, then Dollar-Cost-Averaging may not be for you. Conversely, if you’re looking for absolute guarantees, this time-tested strategy won’t assure a profit. Remember, Dollar-Cost-Averaging works towards reducing your average cost per share. You’ll enjoy a profit only if your selling price exceeds your average cost per share (as it does in the example illustrated here).

Dollar-Cost-Averaging works best for the investor who is neither an aggressive market timer nor the other extreme – the risk-averse investor. In other words, Dollar-Cost-Averaging is for the moderate investor who is willing to follow a consistent strategy for their purchase of investments, giving up the attempt to time a large investment at the bottom of the market. The strategy also helps avoid making a large investment at the top of the market. This is because Dollar-Cost-Averaging doesn’t assure a profit or protect you from loss in a declining market. Also, since such a program involves regular investment purchases regardless of fluctuating price levels of the investment, consider your financial ability to continue purchases through periods of low price levels.

One of the most convenient and flexible means of beginning a Dollar-Cost-Averaging program is by setting up an automatic investment program. Most plans and investment product providers welcome and encourage automatic bank drafts, with a minimum investment as low as $25. Don’t miss out on the valuable benefits of Dollar-Cost-Averaging.

*This information is a general discussion of the relevant federal tax laws. It is not intended for, nor can it be used by any taxpayer for the purpose of avoiding federal tax penalties. This information is provided to support the promotion or marketing of ideas that may benefit a taxpayer. Taxpayers should seek the advice of their own tax and legal advisors regarding any tax and legal issues applicable to their specific circumstances. Investments will fluctuate and when redeemed may be worth more or less than originally invested.

The author is a Financial Representative with North Star Resource Group and can be reached at Zachary.MacDougall@northstarfinancial.com

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continued from page 3
Lunch and Learn Programs: Insurance Considerations in the Construction Context

refusing to contribute to settlement by raising arguments over how many occurrences or claims are being advanced for purposes of triggering the SIR or deductible.

• What are the limitations of coverage? Both clients and defense counsel should know what is and is not being covered under the policy.

Mr. Fiorica emphasized that there are many things that attorneys should be thinking of when a client embarks on a project covered by an OCIP – or even under its own policies. How an attorney defends a client is oftentimes dictated by what considerations have been made up-front or, if the attorney was not initially involved in the matter, can vary the way an attorney handles the defense of its client when assigned the case by the client or an insurance carrier.

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## SDDL Member List

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