

SAN DIEGO  
DEFENSE LAWYERS

# THE UPDATE

FALL 2014

## Gender Bias in the Law: A Problem For All Of Us

By Elizabeth A. Skane  
SKANE WILCOX, LLC

**“There were no women trying cases in my day. But I know there are a few good ones now.”**

This is a statement I heard less than a couple weeks ago while seated in mediation with a retired judge. Earlier in the day, when I challenged his view of the case, he asked me how long I had been practicing law. I responded 15 years longer than my male counterpart on the opposite side sitting in the other room. He also commented as part of the same discussion that if I tried cases like the one in front of him, I would know I was undervaluing the case. I was forced to respond, much to his surprise, that I have tried numerous cases just like this one, and respectfully disagree.

At the time, the judge’s comments did not upset me. In fact, the comments did not bother me at all. It was not the first time that I had been treated in this manner in my career. I chalked up the judge’s comments to the fact that he was trying to pressure me and scare me and my client into settling the case. I mean, that’s his job right? In his day, women did not try cases, so he was a product



honey who commented when I applied to law school that statistically the more educated I became the less likely it was that I would ever get married and have children. It was, as he explained, the “risk” I was taking. It was my client, a male, who commented with outrage on the inappropriateness of the judge’s statements and his way of thinking. But why was he more upset than me?

Like most female attorneys I know, when I think about my last 18 years of practicing law, I can come up with so many examples of bias. Less so now that when I first began practicing, but it still exists. I have been called honey or sweetheart more times that I can count, especially as a young lawyer. As a more

experienced attorney I was recently accused, when advocating my position forcefully, of being a “man hater”. And yet, I have done nothing about it. I have begun to realize that I have come to simply accept bias as a fact of life. I am part of the problem.

What does this say about our society? About our culture in the law? Gender bias has become so ingrained as to become the accepted norm. I allowed it to happen, and sat by and done very little to break the cycle. It breaks my heart when I look at my two little girls, 8, 16 months, and number 3 set to arrive next month. What am I teaching my girls? I am teaching them by my inaction that sexism and gender bias, while not acceptable, is simply a fact of life. But by doing so, I am handicapping their success. I know that I am not alone in my inaction.

When I started writing this article I did some brief research. What I found reflected my own personal experiences. According to “A Current Glance at Women in the Law” published by the American Bar Association in July 2014, women make up more than half of graduating law student population. In fact, in reviewing those statistics it looks like women

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# President's Message

By David B. Roper

LORBER, GREENFIELD & POLITO, LLP

The highlight of SDDL's fall season, the Annual Mock Trial Competition, took place last week and was, as always, a huge success. In the past we had created an unwritten rule that we could limit the number of teams to twenty. That seemed to be about right as far as the number of courtrooms we needed to provide as well as the number of volunteer judges necessary to stock the three judge panels for each of the trials. We also used to allow law schools to automatically register two teams at once. However, these rules started to become a limiting factor as more and more schools sought to compete in the SDDL competition. First, we changed the rules to limit schools to only one team during the initial registration period to permit as many different schools as possible to field a team. Only after the initial registration period were schools allowed to register a second team. Then, this year, the twenty team limit fell by the wayside. We decided to expand the field to twenty-two teams when I received a plaintive email from a law student, a previous competitor, who lamented that she had urged her school to send their two teams to San Diego rather than another competition only to find that, due to our limit, they could only get one team registered. The team that would get to come to San Diego was decided by a toss of the coin, and her team lost. After advocating for the SDDL competition, her team had been shut out. Was there anything we could do? Well, as it happened, expanding the field to twenty-two teams allowed not only her team to compete, but also a second team from one of our perennial participants, a very supportive local school. We wound



up with teams from seventeen different law schools from all over the United States. All we needed to make this come together was the generous participation of the attorneys, mediators and judges of the San Diego legal community to act as judges for the 25 separate trials that make up the competition. As always, you stepped up and donated your time to give these exceptional law students an experience they will remember forever. We know that the student competitors and their coaches appreciate the professionalism and generosity of the volunteer judges. SDDL certainly appreciates the outpouring of support for this event which we receive year after year. There are other competitions, in bigger cities, with more lawyers, but none offer a more benevolent welcome than does San Diego. We could not do it without your help. Thank you all. ♦

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## THE UPDATE

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The Update is published for the mutual benefit of the SDDL membership, a non-profit association composed of defense lawyers in the San Diego metropolitan area. All views, opinions, statements and conclusions expressed in this magazine are those of the authors, and they do not necessarily reflect the opinions or policies of the SDDL or its leadership. The SDDL welcomes the submission of articles by our members on topics of general interest to its membership.

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## 2015 SDDL Board of Directors Election

# DON'T FORGET TO VOTE!!

If you haven't already voted, SDDL Members are reminded to get their votes in by 5:00 p.m. December 5, 2014. Emails with the Ballot link went out on November 3 and 12.

## LUNCH AND LEARN

# The Do's and Don'ts of Duty: Judge Medel Talks Candor

By Daniel Fallon

TYSON & MENDES LLP

**O**pposing counsel is a jerk. The judge is a jerk. Everyone is a jerk! Except you. You're perfect! But how do you deal with the imperfections of others while maintaining your high ethical standards? Luckily for SDDL, Judge Kenneth Medel spoke to our members at the Lunch & Learn where he dissected the duty of candor on October 14, 2014. The MCLE was hosted by Peterson Reporting.

Of anyone in our legal community, Judge Medel truly embodies SDDL's core values of civility, integrity and balance. With stories so funny they had to be true, Judge Medel illustrated how to fulfill your duty of candor to the court without falling flat on your face. Here are the key takeaways from an entertaining and enlightening program by Judge Medel:

- 1. Be Upfront.** Attempts to hide the blemishes of your case never succeed. (Think Igor and Dr. Frankenstein trying to gussy up a corpse in Young Frankenstein.) Alert the court of issues ahead of time so it can prepare accordingly. When your client is one of those "issues," candor to the court doesn't necessarily violate duties owed your client if addressed with a little grace. All in all, honesty is the best policy.
- 2. Quid Pro Quo.** There will come a time when you request leniency from the court, or even opposing counsel. Keep that in mind when others look to you for flexibility. Litigation is filled with enough built-in points of contention, so give some slack where it makes sense and doesn't impact your client.
- 3. Turn the Other Cheek.** Once in a blue moon, opposing counsel is a demon from some other dimension. You know this. The judge knows this. Rather than crafting your arguments to further enrage and embarrass your opponent, take the blame for the discovery dispute to allow the judge to craft

a resolution in your favor without taking sides. Concede on issues that don't really matter. Accepting responsibility leads to credibility with the court and others.

- 4. Do the Right Thing.** When you find yourself in a position to get an unethical leg up on your opponent, remember your reputation is everything in our professional and is far more important than any "victory" gained. In such times of temptation it is ever more important to listen to the angel on your shoulder, and not its fiery counterpart. ♦

## Bottom Line

**Case Title:** Nick Krivitz v. Cynthia Krueger, et al.

**Case Number:** 37-2013-00051612-CU-PA-CTL

**Judge:** Hon. Katherine A. Bacal

**Plaintiff's Counsel:** Barry Pasternack, Esq. (Law Office of Barry Pasternack)

**Defendant's Counsel:** Sean M. Swinford (lead), Esq.; Scott D. Schabacker, Esq. (Law Offices of Scott D. Schabacker)

**Type of Incident/Causes of Action:** Personal Injury (motor vehicle accident)

**Settlement Demand:** Section 998 for \$30,000

**Settlement Offer:** Section 998 for \$20,000

**Trial Type:** Jury

**Trial Length:** 3 days

**Verdict:** \$3,100 (October 10, 2014) ♦



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# SDDL Board Greet New Ninth Circuit Judge and Reminisces with SDDL's Past-Presidents

By Deborah Dixon

WINGERT GREBING BRUBAKER & JUSKIE, LLP

**O**n September 25, 2014, SDDL's Board of Directors and some of its founding members reunited at JSix, the rooftop bar at Hotel Solamar, to welcome Judge John B. Owens from the United States Court of Appeals for the Ninth Circuit. In April 2014, Judge Owens was appointed by President Obama to the Ninth Circuit and was fortunate



▲ David Roper, Andrew Kleiner, Patrick Kearns, Hon. John B. Owens

to have his chambers here in San Diego. Judge Owens was gracious with his time as he made his rounds in San Diego meeting the community leaders, including SDDL's Past-Presidents and Directors.

"It was great to see Judge Owens, whom I have known for years. He has always been approachable and genuinely interested in others. I am sure those traits will continue to be evident as he presides over cases" remarked David Roper, current President of SDDL.

As SDDL gets ready to celebrate 31 years as an organization, it remains important for members and current Directors to learn from prior presidents and founding members,

including attendees, Charles Grebing, Judge Enright, Judge Danielsen, John Clifford, Ed Chapin, Chris Todd, Ben Howard, Darin Boles and Clark Hudson just to name a few of the attendees. The rooftop was filled with the roar of old tales and memories, a tradition that will last another 31 years. ♦



▲ Karen Holmes, Hon. David J. Danielsen, David Roper



▲ Bethsaida Obra-White, Robert Mardian, Alexandra Selfridge



▲ Benjamin Howard, Stephen Sigler, Alexandra Selfridge, Daniel Fallon



▲ Kenneth Greenfield, Christopher Todd, Darin Boles, John Farmer

# 24<sup>th</sup> Annual Mock Trial Competition

By Robert Mardian

HENDERSON, CAVERLY, PUM & CHARNEY LLP

On October 23, 24 and 25, 2014, the San Diego Defense Lawyers held their 24th Annual Mock Trial Competition. The event presented by Judicate West featured 22 teams comprised of 17 law schools from California, Florida, Indiana, New York and Texas. After the preliminary rounds, four schools advanced to the semi-finals: Southern Methodist University Dedman School of Law, Golden Gate University School of Law, Southwestern Law School and the University of Richmond School of Law.

Southwestern Law School and the University of Richmond School of Law advanced to the finals. The Southwestern team was comprised of Stephanie Williams, Vira Samouhi, Monica Arellano and Gregory Selarz. They were coached by Torsten Bassell, Shiraz Khalid, Kunal Jain and McKenzi Brown. The



▲ Left to right: Amy Whitelaw, Danielle Bringard, Robert Mardian, Timothy Patterson, Shaun Frieman, Stephanie Williams, Vira Samouhi, Andrew Kleiner, Monica Arellano and Gregory Selarz. Seated from L to R: Nannette Farina, Hon. Kenneth Medel, Gabriel Benrubi

Richmond team was comprised of Danielle Bringard, Shaun Frieman, Timothy Patterson and Amy Whitelaw. They were coached by Kelly Bundy. The finals were judged by the Honorable Kenneth Medel, Nannette Farina and Gabriel Benrubi with Judge Medel serving as the presiding judge for the second

consecutive year. After an exciting final round, the University of Richmond School of Law took the prize. Congratulations to the University of Richmond School of Law.

The success of the Mock Trial Competition would not have been possible without the help of its membership. The Board of the San Diego Defense Lawyers thanks all of the attorneys and judges who generously donated their time to serve as judges of the competition. SDDL also thanks the University of San Diego School of

Law for hosting the final round and the San Diego Superior Court for hosting the preliminary rounds. A special thank you goes out to Judicate West for its generous support as the presenting sponsor. ♦

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# Insurance Law Update

By James M. Roth  
THE ROTH LAW FIRM, APC

The past few months have seen a flurry of declaratory relief actions brought by insurance carriers. As will be seen below, bad facts tend to result in bad law. In other words, be careful for what you ask.

***A CGL insurance policy's Employment-Related Practices exclusion in a general liability policy was sufficiently plain and clear so as to be enforceable***

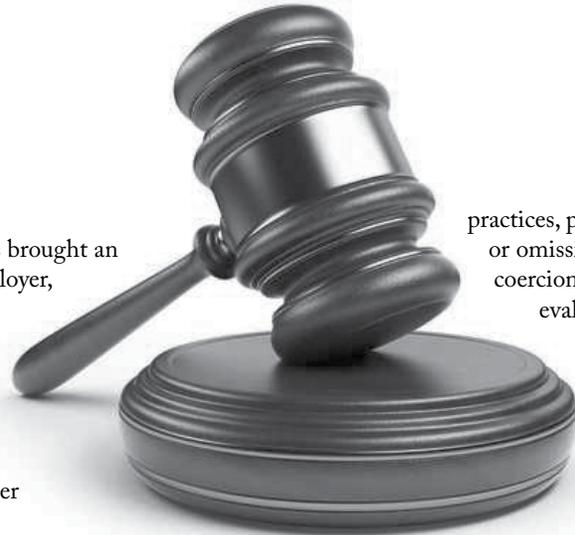
On August 25, 2014 (and as modified September 15, 2014), the Second District, Division 7, held in *Jon Davler, Inc. v. Arch Insurance Company*, (2014) 229 Cal. App.4th 1025, --- Cal.Rptr.3d ---, that employees' injuries caused by their alleged false imprisonment "arose out of" their employment within the meaning of the Employment-Related Practices coverage exclusion in their employer's commercial general liability insurance policy, where the employees were forced into a bathroom for inspection only because they were employees, were following a directive from a supervisor at their place of employment, and would lose their jobs if they did not comply with their supervisor's inspection demand and there was no relationship between the employer and the employees other than the employer-employee

relationship.

A group of employees brought an action against their employer, Jon Davler, Inc., for various employment claims, including sexual harassment, invasion of privacy, and false imprisonment. Jon Davler tendered the action to its insurer, Arch Insurance Company, which denied coverage based on an Employment-Related Practices exclusion (the "ERP"). After Jon Davler filed suit against Arch, the trial court sustained Arch's demurrer to the complaint without leave to amend. In the appeal that followed, Jon Davler, Inc. raised two arguments relative to the ERP: (1) the use of the phrase "such as" was inherently ambiguous; and (2) the use of the phrase "arising out of" created an ambiguity because it appeared both in the coverage clause and in the ERP.

The Court of Appeal affirmed, holding that the ERP was sufficiently plain and clear so as to be enforceable. The ERP stated that the coverage for personal and advertising injury did not apply to "[e]mployment-related

practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, discrimination or malicious



prosecution directed at that person...." In rejecting Jon Davler, Inc.'s challenges to the ERP, the Court found that use of the term "such as" in the CGL insurance policy was not intended to be exhaustive and was illustrative and not limitative. Responding to the second ambiguity argument, the Court found that even though the exclusion did not specifically exclude false imprisonment and the insuring provision specifically provided coverage for injury arising out of false imprisonment, the language of the ERP was clear that injuries arising out of all kinds of employment-related practices, including those listed as examples, were subject to the exclusion, and there was no dispute that the false imprisonment of the

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employees occurred at work in the company restroom, was at the direction of a supervisor, and was employment-related.

***A liability insurance policy that specifically describes a vehicle involved in an accident is primary to a separate policy concurrently in effect that does not describe any vehicle***

On August 20, 2014, the Third District held in *Scottsdale Indemnity Company v. National Continental Insurance Company*, (2014) 229 Cal.App.4th 1166, 177 Cal.Rptr.3d 648, that a commercial truck driver's second automobile liability insurance policy, which did not describe or rate any vehicle, was excess to his primary policy which specifically described and rated his tractor and specifically covered any trailer attached to the power unit.

In this insurance coverage action, two carriers whose commercial policies were concurrently in effect, Scottsdale Indemnity Company ("Scottsdale") and National Continental Insurance Company ("NCI"), sought the trial court's determination whether they were co-primary insurers or whether NCI was an excess insurer for an underlying fatality involving a tractor/trailer rig operated by Manuel S. Lainez. The trial court granted NCI's motion for summary judgment, concluding that Scottsdale was the primary insurer pursuant to California Insurance Code section 11580.9(d) and (h). Subdivision (d) provides in relevant part that: "[W]here two or more policies affording valid and collectible liability insurance apply to the same motor vehicle or vehicles in an occurrence out of which a liability loss shall arise, it shall be conclusively presumed that the insurance afforded by that policy in which the motor vehicle is described or rated as an owned automobile shall be primary and the insurance afforded by any other policy or policies shall be excess." Subdivision (h) provides in relevant part that: "Notwithstanding subdivision (b), when two or more policies affording valid and collectible automobile liability insurance apply to a power unit and an attached trailer or trailers in an occurrence out of which a liability loss shall arise, and one policy affords coverage to a named insured in the business of a trucker, defined as any person or organization engaged in the business of transporting property by auto for hire, then the following shall be conclusively presumed: If at the time of loss, the power unit is being operated by any person in the business of a trucker, the insurance afforded by the policy to the person engaged in the business of a trucker shall be primary for both power unit and trailer or trailers, and the insurance afforded by the other policy shall be excess."

In affirming the trial court, the Court noted that to minimize insurance coverage litigation

when more than one insurance policy provides coverage, the Legislature has created a series of conclusive presumptions: "Section 11580.9 contains a number of subdivisions designed to cover many common coverage dispute situations; each addresses a different set of factual circumstances and identifies which policies will be deemed primary and which policies will be deemed excess."

The Court explained its rationale as follows:

We accept Scottsdale's premise that two insurance policies can be equally ranked or coprimary [*sic*] under section 11580.9. And we certainly subscribe to the basic tenets of statutory construction, including our adherence to the plain meaning of the words of the statute and the elementary principle that a court cannot add or subtract words to or from the statute. But we disagree with Scottsdale that we should force application of subdivision (h) to a situation, as here, that was not intended or contemplated by the Legislature rather than to apply subdivision (d), which clearly and unequivocally applies to the facts and establishes the priority of coverage as explained by the trial court at some length. Scottsdale's coverage is primary because Lainez's truck was particularized on the policy, whereas NCI is secondary because his rig was not identified at all on its policy.

The Court concluded by explaining that "The language of subdivision (h) does not address a situation where, as here, there are two trucker policies covering both the tractor and the trailer. Rather, the statute differentiates between the operation of the power unit and the operation of the trailer."

***As a matter of first impression, one appellate court declined to expand the "relative resident" exclusion in an automobile insurance policy to a non-relative roommate of an insured***

On September 24, 2014, the Fourth District, Division 3, held in *Mercury Casualty Company v. Chu*, (2014) 229 Cal.App.4th 1432, 178 Cal.Rptr.3d 144, that as a matter of first impression, an insured driver's non-relative roommate, who was a passenger in the driver's vehicle at the time of an accident, could not be included as "an insured" under the driver's automobile liability policy for purposes of excluding coverage for bodily injury caused to the roommate by use of the insured vehicle by the insured driver.

Mercury Casualty Company ("Mercury") filed an action seeking declaratory relief

regarding its insurance obligation towards Hung Chu ("Chu") and his roommate Tu Pham ("Pham"). Mercury issued an automobile policy to Chu insuring his vehicle. Chu was driving, and Pham was a passenger, when Chu collided with another vehicle. Pham filed a personal injury action against Chu and the other driver, obtaining a \$333,300 judgment against Chu. Mercury sought a judicial determination confirming Mercury's decision that Chu's policy excluded coverage for Pham's judgment under the "resident exclusion."

Chu filed a cross-complaint against Mercury for breach of contract, bad faith, and general negligence. Mercury prevailed in its motion for summary adjudication on the issue of whether the policy provided coverage for Pham's judgment. The trial court determined Mercury had no duty to indemnify Chu with respect to the judgment.

In reversing and remanding, the Court began its analysis with a lengthy historical overview:

*After years of judicial straining to reconcile the oftentimes competing interests of automobile liability insurers, their insureds and the state's interest by way of a general public policy making owners of motor vehicles financially responsible to those injured by them in the operation of such vehicles, the Legislature announced the public policy in regard to provisions authorized or required to be included in policies affording automobile liability insurance . . . [by] carefully delineating the minimum required coverages of, and the extent of permitted exclusions to coverage in, policies of automobile liability insurance issued in this state.*

[Citations omitted.]

Insurance Code Section 11580.1, subdivision (c), lists the only permissible exclusions from coverage allowed under California law for an automobile liability insurance policy. "Any exclusion not expressly authorized by section 11580.1 is therefore impermissible and invalid." Relevant to this case, section 11580.1(c)(5) authorizes the carriers of automobile liability insurance to provide for exclusion of claims of liability coverage for bodily injury brought by "an insured." Specifically, the exclusion permits exclusion of liability to either "an insured" or "an insured whenever the ultimate benefits of that indemnification accrue directly or indirectly to an insured." The latter exclusion would typically apply to a resident relative of

# 30<sup>th</sup> Annual Red Boudreau Trial Lawyers Dinner

By Alexandra "Sasha" Selfridge  
LAW OFFICES OF KENNETH N. GREENFILED

**M**ore than 400 members of the San Diego Legal Community attended the 30th Annual Red Boudreau Trial Lawyers Dinner on September 13, 2014 at the U.S. Grant. The San Diego Defense Lawyers, American Board of Trial Advocates and Consumer Attorneys of San Diego jointly presented the dinner. The event successfully raised more than \$45,000 for St. Vincent de Paul Village, one of Father Joe's Villages. The prestigious Daniel T. Broderick, III Award for Civility, Integrity, and Professionalism was presented to Steven M. Boudreau. If you were unable to attend, you missed some great speeches by past Broderick Award winners, Daniel M. White and Susan M. Hack, and a fabulous comedy routine by Ken Turek. A good time was had by all at this black tie gala! ♦



▲ Steve Boudreau, Susan Hack

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▲ Father Joe Carroll, Mike Neil



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# California Civil Law Update

By Monty McIntyre  
ADR SERVICES, INC.

## CALIFORNIA COURTS OF APPEAL

### Civil Procedure (Attorney Fees, Discovery)

*Bui v. Nguyen* (2014) \_ Cal.App.4th \_ , 2014 WL 5449782: The Court of Appeal reversed the trial court's order granting attorney fees under Code of Civil Procedure section 1021.5. The trial court abused its discretion in granting attorney fees under section 1021.5 because plaintiff failed to establish that private enforcement was necessary to protect the public from false advertising by defendant. (C.A. 6th, October 28, 2014.)

*Evilsizor v. Sweeney* (2014) \_ Cal.App.4th \_ , 2014 WL 5449805: The Court of Appeal affirmed the trial court and held that a trial court may impose sanctions under Code of Civil Procedure section 1987.2 against a litigant for belatedly withdrawing a motion to quash that, even though legitimately filed, was rendered unnecessary by a subsequent amendment or withdrawal of the subpoena. (C.A. 1st, October 28, 2014.)

### Class Action

*Kight v. CashCall, Inc.* (2014) \_ Cal.App.4th \_ , 2014 WL 5573457: The Court of Appeal affirmed the trial court's order decertifying the class. On remand after an appeal, the trial court properly granted CashCall's motion to decertify a class action alleging violations of California Penal Code section 632, which imposes liability on a "person" who intentionally "eavesdrops upon or records [a] confidential communication" and engages in this conduct "without the consent of all parties." The class was properly decertified based primarily on the argument that the issue of whether any particular class member could satisfy the reasonable expectation of privacy test required an assessment of numerous individual factors, and these individual issues predominated over any remaining common issues, making a continued class action unmanageable. (C.A. 4th, filed October 9, 2014, published November 4, 2014.)

### Employment

*Godfrey v. Oakland Port Services Corp.* (2014) \_ Cal.App.4th \_ , 2014 WL 5439289: The Court of Appeal affirmed the trial court judgment of \$964,557.08 in a wage and hour class action. The Court of Appeal found no

merit in defendant's argument that federal law preempts application of California's meal and rest break requirements to motor carriers, or the other various arguments. (C.A. 1st, October 28, 2014.)

### Legal Malpractice

*Kasem v. Dion-Kindem* (2014) \_ Cal. App.4th \_ , 2014 WL 5464694: The Court of Appeal affirmed the trial court's demurrer without leave to amend regarding the third amended complaint. Plaintiff sued for legal malpractice claiming her attorney negligently failed to designate and call an expert witness at the underlying trial on the issue of whether sewage qualified as a "Hazardous Material" under the lease after the trial court denied the attorney's request to take judicial notice of statutes which included sewage in the definition of hazardous material. The demurrer was properly sustained because it was the trial court's error in not taking judicial notice of the statutes, not attorney negligence, that caused the result. Because plaintiff never appealed that decision, the trial court's error could not be corrected. (C.A. 2nd, filed October 3, 2014, published October 29, 2014.)

### Torts

*Amerigas Inc. v. Landstar Ranger, Inc.* (2014) \_ Cal.App.4th \_ , 2014 WL 5408653: The Court of Appeal affirmed the bench trial judgment in favor of cross-defendant Landstar Ranger, Inc. (Landstar). Truck driver Steven K. King sued AmeriGas Propane, L.P. (AmeriGas) for an injury caused by an AmeriGas employee who was unloading empty propane tanks from King's flatbed trailer at an AmeriGas facility. AmeriGas settled with King and cross-complained against Landstar for equitable indemnity. The trial court properly found that Landstar did not violate Federal Motor Carrier Safety Regulations regarding experienced drivers, and even if there had been a violation, it would not have been the proximate cause of the injury because the propane tanks were secure and stable during transit and when they arrived at the AmeriGas yard. (C.A. 4th, October 24, 2014.)

*Colombo v. BRP US Inc.* (2014) \_ Cal. App.4th \_ , 2014 WL 5472421: The Court of Appeal affirmed the trial court judgment for plaintiffs arising from serious injuries caused by a jet ski accident. One plaintiff suffered serious and permanent injury to her

rectum, and the other plaintiff suffered serious and permanent injuries to her vagina when, because of operator error, they fell off a jet ski. Once in the water, both plaintiffs were

injured when the powerful jet thrust from the watercraft ripped their flesh. The Court of Appeal affirmed a judgment for one plaintiff of \$3.385 million in compensatory damages and \$1.5 million in punitive damages, and a judgment for the other plaintiff of \$1.063 million in compensatory damages and \$1.5 million in punitive damages.

*Fiorini v. City Brewing Company, LLC* (2014) \_ Cal.App.4th \_ , 2014 WL 5743133: The Court of Appeal reversed the trial court's ruling granting a motion for judgment on the pleadings in a case where the plaintiff alleged that negligence and strict liability caused the death of his 23 year old son after he drank two 23.5 ounce cans of Four Loko that each contained as much alcohol as five to six 12-ounce cans of beer and as much caffeine as approximately four cans of Coca-Cola. Because the complaint did not allege that City Brewing (1) exercised any control over the cans of Four Loko after they were delivered to a regional distributor or (2) took an affirmative step to supply the Four Loko to Fiorini, City Brewing did not "furnish" the beverage to Fiorini, and the civil immunity in California's dram shop statutes did not extend to City Brewing. (C.A. 5th, November 6, 2014.)

*Honeycutt v. Meridian Sports Club, LLC* (2014) \_ Cal.App.4th \_ , 2014 WL 5776200: The Court of Appeal affirmed the trial court's motion for summary judgment for defendant in an action where plaintiff suffered a knee injury during a kickboxing class while being assisted by an instructor at defendant club. The trial court properly granted defendant's motion for summary judgment, ruling that plaintiff had signed a valid waiver of liability, defendant did not act with gross negligence, and the doctrine of primary assumption of the risk barred relief. (C.A. 2nd, filed October 21, 2014, published November 6, 2014.)

*Lawrence v. La Jolla Beach and Tennis Club, Inc.* (2014) \_ Cal.App.4th \_ , 2014 WL 5499374: The Court of Appeal reversed the trial court's rulings granting summary judgment for defendant. The Court of Appeal agreed that the trial court erred in ruling that (1) defendants had no duty and breached no duty to install a fall prevention device on the window from which the five-year-old plaintiff fell; and (2) the accident was not caused by defendants' failure to install a fall prevention device on the window. (C.A. 4th, October 31, 2014.) ♦



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# Employment Law Update – Cell Phone Reimbursement

By Brittany H. Bartold  
LEWIS BRISBOIS BISGAARD  
& SMITH LLP

On August 12, 2014, the California Court of Appeal, Second Appellate District, Division Two (Los Angeles) published an opinion in *Cochran v. Schwan's Home Service, Inc.* (2014) 228 Cal.App.4th 1137, analyzing whether “an employer always [has] to reimburse an employee for the reasonable expense of the mandatory use of a personal cell phone, or is the reimbursement obligation limited to the situation in which the employee incurred an extra expense that he or she would not have otherwise incurred absent the job?” (Id. at p. 1144.) The court held that “when employees must use their personal cell phones for work-related calls, Labor Code section 2802 requires the employer to reimburse them. Whether the employees have cell phone plans with unlimited minutes or limited minutes, the reimbursement owed is a reasonable percentage of their cell phone bills.” (Id. at p. 1140.)

The case arose out of a putative class action lawsuit against defendant on behalf of customer service managers who were not reimbursed for expenses pertaining to the work-related use of their personal cell phones. (*Cochran v. Schwan's Home Service, Inc.*, supra, 228 Cal.App.4th at p. 1140.) The trial court denied plaintiff's motion for class certification finding that individual questions predominated. According to the trial court, a determination of whether an expense was incurred for a class member's business use would require an examination of each class member's cell phone plan. (Id. at pp. 1140-1141.) The court also assumed that an employee does not suffer an expenditure or loss if his or her cell phone charges were paid by a third person. (Id. at p. 1144.)

The Court of Appeal reversed because the trial court relied on erroneous legal assumptions about the application of Labor Code section 2802, subdivision (a), which states that “[a]n employer shall indemnify his or her employee for all necessary expenditures

or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer[.]” (*Cochran v. Schwan's Home Service, Inc.*, supra, 228 Cal.App.4th at pp. 1143-1144.) The court explained that “reimbursement is always required. Otherwise, the employer would receive a windfall because it would be passing its operating expenses onto the employee. Thus, to be in compliance with section 2802, the employer must pay some reasonable percentage of the employee's cell phone bill. Because of the differences in cell phone plans and worked-related scenarios, the calculation of reimbursement must be left to the trial court and parties in each particular case.” (Id. at p. 1144.) According to the court, “[t]o show liability under section 2802, an employee need only show that he or she was required to use a personal cell phone to make work-related calls, and he or she was not reimbursed.” (Id. at p. 1145.) ♦



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# The Ins & Outs of Asset Allocation

By Zach MacDougall  
NORTH STAR RESOURCE GROUP

Remember the advice, “Don’t put all your eggs in one basket”? That way, if you take a tumble, you won’t break all your eggs. Good advice for eggs; better advice for investments, especially in these uncertain times.

Thanks to the stubborn, lingering economic slowdown and ongoing concerns about national debts and the fiscal stability of the U.S. and other governments, there is no clear path pointing where to put your money. It is no longer clear where you can find reasonable opportunity balanced against minimal risk. As a result, some folks are considering moving to the investment sidelines and stashing all their assets in low-yield fixed accounts. Their logic is that the returns may be low (perhaps as low as half a percent), but the risk of loss is minimal. What they do not realize, perhaps, is that, while their money may be safe from the risk of loss of principal, they ignore inflation risk and opportunity risk.

**Is there a better way?** You bet. If you are not sure which way to go with your money, consider a carefully planned financial strategy that uses asset allocation.

**Asset allocation** is based on a simple concept: Diversify your portfolio among different types of assets. These may include stocks, bonds, mutual funds, and cash, as well as real estate and precious metals. The idea is to spread your risk. Executed carefully and correctly, with planning and forethought, asset allocation has the potential to help you achieve a balance of safety and growth.

**The asset allocation advantage:** If you heavily invest in one type of asset and its value plunges, you’ll suffer steep losses. If, however, you put your money in a diverse range of assets, the impact of losses from one troubled venture would likely be lower. Investments will fluctuate and may be worth more or less than when originally invested. While asset allocation cannot guarantee that you won’t lose money, it can reduce your portfolio’s overall risk and help you reach your investment goals.



**At the same time (and this is crucial) keep in mind that asset allocation won’t produce the same portfolio for everyone.** The right mix for your brother-in-law may be totally wrong for you. Correctly done, asset allocation is highly personal. It should reflect your individual investment objectives and risk profile. The asset allocation mix that works best for you at any given point in your life will depend largely on your time horizon (such as your projected retirement date) and your ability to tolerate risk, as well as prevailing economic conditions.

**An example of asset allocation in action:** Jack and Kris are in their early 40s and have a strong tolerance for risk. They are also fairly

*continued on page 14*



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**THE INS AND OUTS OF ASSET ALLOCATION***continued from page 13*

knowledgeable and actively involved in their own investment decisions. So they put a larger portion of their assets into more aggressive, higher-risk investments.

Bob and Mary, on the other hand, are in their mid-50s and are mapping out their retirement plans. By their own admission, they are not financially sophisticated and they do not want to be actively involved in monitoring their investments. They are fairly conservative in their investment approach. Therefore, with the help of their financial advisor, they allocate more of their assets into bonds, money market accounts, fixed annuities, and certificates of deposit.

Here is one possible “mix” of assets for Jack & Kris (a young couple) and Bob & Mary, (a couple approaching retirement).

**Four keys to effective asset allocation:**

1. Know your goals and risk tolerance. This will help guide your investment decisions.
2. Choose your asset mix with care. The

Assets	Jack & Kris (More Aggressive)	Bob & Mary (More Conservative)
Large Cap Blend	35%	20%
Small Cap Blend	20%	5%
International Stock	25%	15%
Domestic Bonds	10%	45%
International Bonds	8%	10%
Cash	2%	5%

*This example is for illustration purposes only. It is not indicative of any particular investment. Each individual's asset mix should reflect his or her specific strategy and objectives.*

- number of choices is staggering. Do your homework. Know why you make every selection based on a well-thought-out strategy. No impulse buys!
3. Review your asset mix at least annually. Not only do goals and risk tolerances tend to evolve over time, but the economy also changes. An asset mix that works this year may be all wrong in 12 months.

4. Get good advice. Asset allocation can be tricky. Fortunately, there is no need to go it alone. Work with an experienced, knowledgeable professional advisor.

*This information should not be considered as tax or legal advice. Please consult a tax or legal professional for advice regarding your specific situation. ♦*

**INSURANCE LAW UPDATE***continued from page 7*

the insured.

The Court then shifted its analysis to the definition of “resident relative,” noting that:

*[O]ver the past 33 years various iterations of the definition of “resident relative” have been the subject of judicial interpretation, with the terms being broadly construed when the result is to find coverage and narrowly construed when the result is to preclude it. What most courts appear to agree upon is “the term ‘residence’ connotes any factual place of abode of some permanency, more than a mere temporary sojourn. This understanding is consistent with dictionary definitions of the term “resident” as one “who dwells in a place for a period of some duration” and “residence” as “a temporary or permanent dwelling place, abode, or habitation to which one intends to return as distinguished from a place of temporary sojourn or transient visit.” [Citations omitted.]*

Noting the efforts to judicially extend the definition of a “non-relative resident” under the automobile policy exclusion was a matter of first impression, the Court characterized Mercury’s efforts as “new” because “we [the Court] found no case authority, law review

article, or treatise examining [that exclusion’s] application to any class of persons other than “relative residents.” Dismissing the argument *in toto*, the Court observed that “Mercury cites to no authority permitting an insurance company to achieve liability immunity from a significantly larger class of people based on their residency status alone and presumably without their knowledge or consent.” The Court’s analysis then shifted to discussing how the public policy behind the limited statutory exclusions would be undermined if the Mercury extension were to be adopted.

***Massage therapist was not performing duties related to the conduct of his employer’s massage therapy business, within the meaning of employer’s comprehensive general liability insurance policy, when a therapist allegedly sexually assaulted client***

On October 6, 2014, the Second District, Division 4, held in *Baek v. Continental Casualty Company*, (2014) --- Cal.App.4th ---, --- Cal.Rptr.3d ---, 14 Cal. Daily Op. Serv. 11,642, that no potential for coverage under a massage center’s comprehensive general liability insurance policy was available to a massage therapist alleged to have sexually assaulted a client because the alleged assault was not within the course or scope of the therapist’s “employment” as that term was defined by the CGL policy.

Luiz Baek, a massage therapist employed

by Heaven Massage and Wellness Center (“HMWC”), was accused in an underlying action of sexually assaulting a client during a massage. Baek alleged that Continental Casualty Company (“Continental”), HMWC’s comprehensive general liability insurer, had a duty to defend and indemnify him in that action, and that its failure to do so constituted breach of contract, breach of the implied covenant of good faith and fair dealing, and fraud. The trial court sustained Continental’s demurrer to all causes of action, concluding as a matter of law that Baek was not entitled to a defense under the Continental policy.

The Court of Appeal affirmed, holding that to demonstrate that he was insured under the policy, Baek had to allege that the acts on which liability was based were, as required by the policy’s language, “with respect to the conduct of [HMWC’s] business,” “within the scope of ... employment,” or committed “while performing duties related to the conduct of [HMWC’s] business.” Because the intentional sexual assault alleged in the underlying case cannot properly be characterized as within the scope of Baek’s employment or having occurred while performing duties related to the conduct of HMWC’s business, Baek was not insured under the policy, and Continental had no duty of defense or indemnity. ♦

# Exciting Changes for 2015 SDDL Membership

## Including Membership for Paralegals and a Reduced Fee for First Time Members

San Diego Defense Lawyers is pleased to announce that, beginning in 2015, it will offer two new types of membership. For the first time, the organization has created a membership level for paralegals who are primarily involved in civil defense litigation. The paralegal membership is focused on providing a cost-effective means to obtain continuing education credits at SDDL programs. SDDL offers approximately 16 separate continuing



education events each calendar year, covering all necessary subject areas including recognition and elimination of bias as well as substance abuse and impairment of professional competence. That equates to 20 hours of available CLE credit per year. The annual paralegal membership costs only \$75 and entitles the paralegal member to access to all SDDL continuing education events.

San Diego Defense Lawyers is also pleased to announce that first time attorney members will be offered a discounted first-year

membership. Starting in 2015, new member dues will be \$125. This is a \$35 discount designed to encourage San Diego defense attorneys to join the organization and learn of its benefits. Regular membership dues for 2015 will be \$160.

Paralegal and First Time Member Applications are included in this issue of the Update. Additional applications are available at <http://sddl.org/downloads/> ♦

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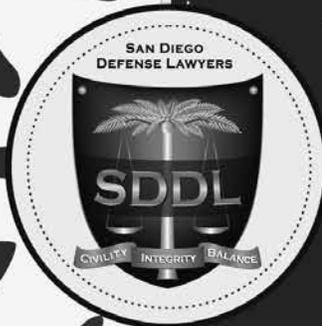
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## SDDL PARALEGAL APPLICATION

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**Firm Name:** \_\_\_\_\_

**Address:** \_\_\_\_\_

**City:** \_\_\_\_\_ **State:** \_\_\_\_\_ **Zip:** \_\_\_\_\_

**Phone:** \_\_\_\_\_ **Email:** \_\_\_\_\_

Paralegals \$75.00/year\*

The association's dues year runs from January 1 to December 31

\* The SDDL Paralegal Membership allows you entry to all SDDL Continuing Education Events Only.

By this application I am:

\_\_\_ applying for new membership

Please make check payable to: **San Diego Defense Lawyers** and mail with application to:

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Membership Director  
P.O. Box 124890  
San Diego, CA 92112  
Email: [dbedri@neildymott.com](mailto:dbedri@neildymott.com)



## SDDL NEW MEMBER APPLICATION

**Name:** \_\_\_\_\_

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**Renewing Members** \$160.00 per year

**New Members** \$125 for the first year

The association's dues year

runs from January 1 to December 31

By this application I am:

\_\_\_ applying for new membership

\_\_\_ renewing my current membership

Please make check payable to: **San Diego Defense Lawyers** and mail with application to:

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# Election 2014: SDDL Board of Directors

This year features an exciting election where nine members of SDDL are competing to fill five vacancies on SDDL's Board of Directors. Ballots were emailed to the membership on November 3 and November 12. Members vote online via a unique link contained in each member's email. Members may vote for up to five candidates, but may not give more than one vote to any single candidate – no cumulative voting. The online voting closes at 5:00 p.m. on December 5, 2014.

The Board of Directors is comprised of four officers and seven Directors at Large. Each year the members of SDDL have the opportunity to vote in members to serve as the Directors at Large. Directors at Large are elected for two year terms. Directors at Large assist SDDL in promoting its mission of service to the San Diego legal community and the precepts of civility,

integrity, and balance. SDDL achieves these goals through its quarterly newsletter The Update, monthly CLE lunches, evening CLE seminars, quarterly happy hours, annual charity golf tournament, and annual mock trial competition. Each member of the Board

is responsible for taking the lead in organizing one or more of these events. The Board of Directors is also responsible for electing the President, Vice President, Treasurer and Secretary of SDDL each year. ♦

## This year's Board Candidates are:

**Ben Cramer** of La Follette Johnson De Haas Fesler & Ames

**P.J. Lucca** of Morris Polich & Purdy LLP

**Eric R. Deitz** of Wingert Grebing Brubaker & Juskie LLP

**Robert Mardian** of Henderson, Caverly, Pum & Charney LLP

**Jodi L. Doucette** of Ferris & Britton P.C.

**E. Kenneth Purviance** of Hughes & Nunn LLP

**Colin M. Harrison** of Wilson Getty LLP

**Vanessa C. Whirl** of Horton, Oberrecht, Kirkpatrick & Martha, APC

**Bradley Lebow** of Butz Dunn & DeSantis, APC

## COVER STORY - GENDER BIAS IN THE LAW: A PROBLEM FOR ALL OF US continued from page 1

in law school have comprised close 50% of those graduating since at least 1999. And yet, we continue to be under represented in power positions and underpaid in the law across all spectrums.

I recently read a Wall Street Journal article published May 4th, 2014 that notes the following sobering facts when it comes to male vs female compensation levels in the law: 1) female law-firm partners continue to lag behind their male counterparts when it comes to billing rates, commanding on average 10% less for their services. For example, senior male litigators at regional firms in Los Angeles with more than 25 years of experience charged on average 8.3% more than their female equivalents. In New York, the average male partner at a 1,000-plus lawyer firm with 13 to 24 years of experience representing investment banks was billed out at nearly 25% more than the average female partner. 2) Women make up only 17% of so-called equity partners with ownership stakes at the 200 top-grossing U.S. law firms, according to the National Association of Women Lawyers.

When evaluating women in power positions in the law, the American Bar Association study found that gender

inequality pervades this arena as well. Among their statistics published in their 2014 study are the following: 1) as general counsel to fortune 500 companies, women make up only 21% 2) In Fortune 501 to 1000 companies, women general counsel make up 16.8% of the total 3) Only 24.1% of all federal court judges in this country are female 4) as an average of all judgeship positions at both the state and federal court level, women make up 27.1% of those positions.

So in thinking about this topic I realize there is so much more that I can and should be doing to combat gender inequality. Just this year, my firm became a certified women owned business by one of the national certifications agencies that open up women owned businesses for federal and state incentives for contracting purposes, namely the Women's Business Enterprise National Council. We also joined an organization called NAMWOLF (National Association of Minority and Women Owned Law Firms). My partner also helped formed last year an organization last year called WCLA (Women's Construction Litigation Alliance).

But the problem is that just joining these organizations is not enough. There are many

of us, myself included, who are partners in firms, trying cases, and running business that can do so much more. We need to find a way to support the young female attorneys and business women in our industry. We need to mentor these women in the law. Let's teach them how to succeed in what can often be a sexist environment. It is only through their success that we can begin to change the environment for the benefit of us all. I for one make want to make a commitment to do much more. ♦

# SDDL Recognition of Law Firm Support

**T**he *Update* traditionally included a list of current SDDL members at the end of each edition. As part of the SDDL Board's proactive efforts to protect the privacy of its members, the *Update* will no longer include a list of current members. We have observed over the course of the last year or so an increasing number of requests from vendors and other bar organizations to hand over the contact information of our members. In each case, we have rejected the request. The SDDL Board is concerned that third parties may use other means to identify our members to target them for the marketing purposes. Because the *Update* is published online and searchable through Google (and other search engines), the decision has been made to discontinue the identification of the entire membership in the *Update*.

In place of the membership list, the SDDL Board will instead recognize some of the outstanding law firms that contribute to SDDL's success. Each edition will feature two categories for recognition: 1) The 100% Club – this recognizes law firms with two or more attorneys where all attorneys in the firm are members of SDDL; and 2) The 10 Firms with the Most SDDL Members – this recognizes firms who have the most amount of attorneys as members of SDDL. If there are any errors in the information provided, please email [rmardian@hcesq.com](mailto:rmardian@hcesq.com), so that corrections can be made for the next edition.

## The 100% Club

- Belsky & Associates
- Butz Dunn & DeSantis
- Gentes & Associates
- Grimm Vranjes & Greer LLP
- Hughes & Nunn, LLP
- Law Offices of Kenneth N. Greenfield
- Letofsky McClain
- The Roth Law Firm
- White Oliver & Amundson APC

## The 10 law firms with the highest SDDL membership

- The Lorber, Greenfield & Polito, LLP – 29 members
- Neil, Dymott, Frank, McFall & Trexler, APLC – 19 members
- Tyson & Mendes LLP – 17 members
- Grimm Vranjes & Greer LLP – 16 members
- Balestreri Potocki & Holmes – 11 members
- Butz Dunn & DeSantis – 11 members
- Wilson Elser Moskowitz Edelman & Dicker LLP – 10 members
- Wingert, Grebing, Brubaker & Juskie, LLP – 9 members
- Farmer Case & Fedor – 9 members
- The Law Offices of Lincoln, Gustafson & Cercos, LLP – 9 members ♦



SDDL Board of Directors: (from left to right) Bethsaida Obra-White, David D. Cardone, Andrew Kleiner, Daniel P. Fallon, Patrick J. Kearns, Stephen T. Sigler, Gabriel M. Benrubi, Samir R. Patel (*emeritus*), David B. Roper, Alexandra N. Selfridge, Executive Director Dianna Bedri. **Not pictured**, Robert C. Mardian III, Debra Dixon

# On the Move

## ◆ ROBERT W. FRANK NAMED 2015 BEST LAWYERS® "LAWYER OF THE YEAR" FOR MEDICAL MALPRACTICE IN SAN DIEGO

Bob Frank of Neil, Dymott, Frank, McFall & Trexler, APLC was recently selected as 2015 "Lawyer of the Year" for Medical Malpractice Law - Defendants in the San Diego area by Best Lawyers.



Only a single lawyer in each practice area and designated metropolitan area is honored as the "Lawyer of the Year," making this accolade particularly significant. These lawyers are selected based on particularly impressive voting averages received during the peer-review assessments. Receiving this designation reflects the high level of respect a lawyer has earned among other leading lawyers in the same communities and the same practice areas for their abilities, their professionalism, and their integrity.

The San Diego Defense Lawyers congratulates Mr. Frank on this prestigious recognition.

## ◆ DEBORAH DIXON NAMED TO TOP 40 UNDER 40

Deborah Dixon, SDDL Board Member and partner of Wingert, Grebing, Brubaker & Juskie, LLP was recently honored

by SD Metro as one of San Diego's "40 under 40," which recognizes only 40 men and women in San Diego County who are recognized as "some of the best and brightest minds of San Diego County."

The San Diego Defense Lawyers congratulates Ms. Dixon on this prestigious recognition. ♦



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