A·D·C VERITAS

# DEFENSE COMMENT

Association of Defense Counsel of Northern California and Nevada – *Serving the Civil Defense Bar Since 1959*

Vol. 32, No. 1 / Spring 2017

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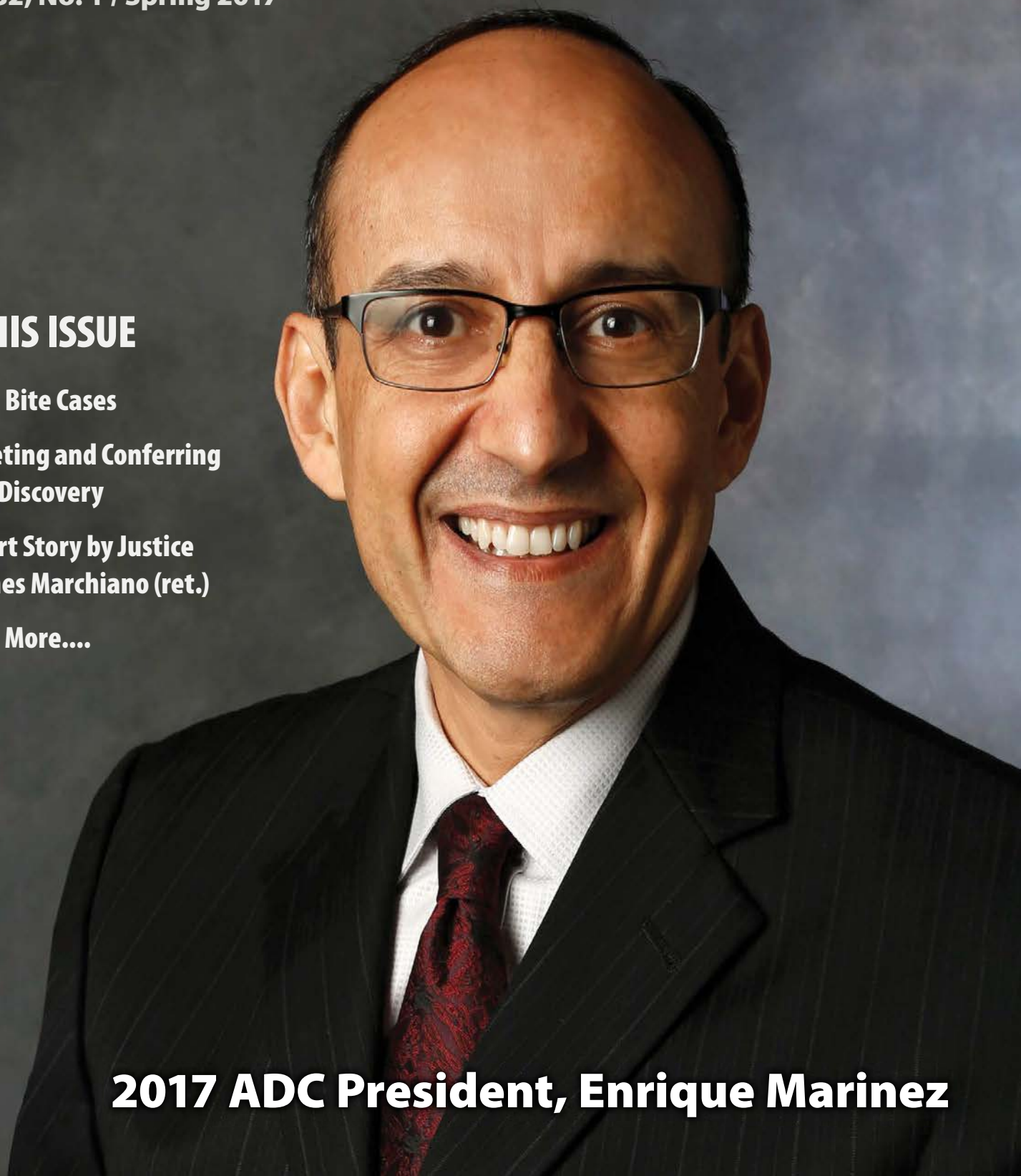

**2017 ADC President, Enrique Marinez**

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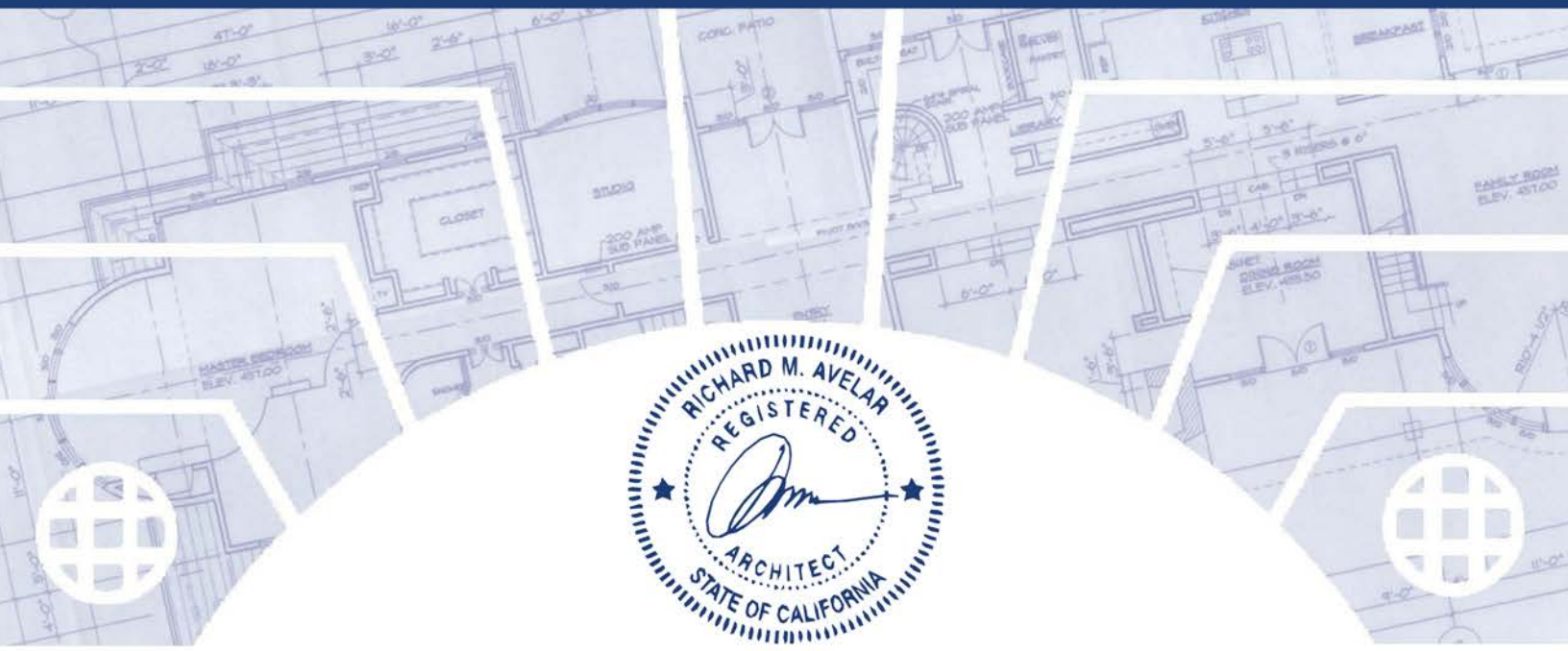






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# DEFENSE COMMENT

ASSOCIATION OF DEFENSE COUNSEL OF NORTHERN CALIFORNIA AND NEVADA – *Serving the Civil Defense Bar Since 1959*


## FEATURES



## DEPARTMENTS



***Defense Comment*** would be pleased to consider publishing articles from ADC members and friends. Please send all manuscripts and/or suggestions for article topics to: David A. Levy, Office of San Mateo County Counsel, 400 County Center 6th Floor, Redwood City, CA 94063. Phone: (650) 363-4756; Fax: (650) 363-4034; E-mail: *dlevy@smcgov.org*.

**Enrique Marinez**
**2017 President**

# Dear Friends,

As the new ADC President, I am honored to serve the Association and to work with our committed Board of Directors, Committee Chairs, Substantive Law Section Chairs and professional staff, led by Executive Director Jennifer Blevins.

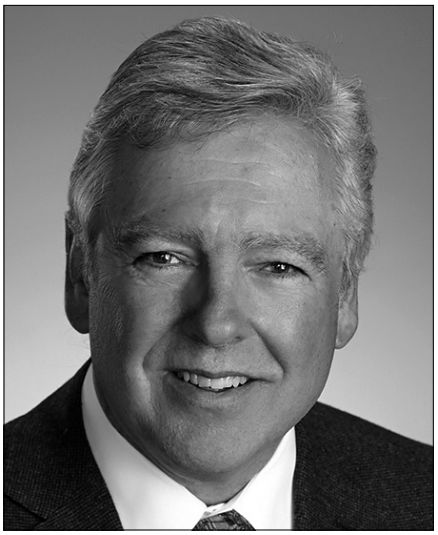
The ADC, now in its 57th year of service, is the preeminent organization in Northern California and Nevada standing up for attorneys who make their living defending civil lawsuits. Our members practice in a wide variety of specialties, but are united in their desire for an organized voice to put forth the defense perspective to the State Legislature and the Judicial Council through our Legislative Advocate, Mike Belote, of the California Defense Counsel, and to the Courts through the work of our Amicus Committee and Bench-Bar Committee. Just this past January the officers of the California Defense Counsel and I met with Chief Justice Tani Cantil-Sakauye in Sacramento to discuss topics important to the judicial branch and our membership. I am pleased to report it was a productive meeting.

One of the main goals of the ADC is to provide our members with timely education programs. The continuing education calendar is bursting with seminars throughout the year, including programs regarding: Employment Law; Construction Defects; Toxic Torts; Law Firm Management; Basic Training; plus hot topic webinars and podcasts to keep members informed. The Substantive Law Sections are very busy planning seminars and providing members with vital information via the NewsFlashes.

As an example, the Annual Meeting in December was a great success, not only in providing quality educational programs, but also in gathering friends and colleagues in a social setting. The success of the Annual Meeting was due, in large part, to the efforts of ADC First Vice President, John Cotter. Inspirational speaker "Gunny" Sergeant Nick Popaditch, exemplified what it means to persevere, and Keynote Speaker Judstice Gilbert provided insight into the wheels of justice. Look for more of the same this upcoming year.

As your President, I am committed to continuing with the long-standing efforts to better utilize our nine specific practice Substantive Law Sections. Each Section has its own e-mail group allowing members to communicate on specific topics pertinent to the practice area. I encourage you to reach out to the chairs of the different Sections and provide them with any updated information and/or inquiries as to the current practice of law in their Sections. Better yet, get involved in one or more Sections by offering to write a NewsFlash, or an article for our magazine, or even help organize a program in one of your areas of expertise.

*Continued on page 37*



**Michael D. Belote**
California Advocates, Inc.

# It's Back! Sales Tax on Services Bill Reintroduced

When the deadline for introduction of new bills for 2017 was reached on February 17, the total was 1687 new proposals in the Assembly, and 808 in the state Senate, for a grand total of 2495. This number actually represents an increase over previous years. What, we don't have enough law in California already?

Dozens of bills already have been identified of potential interest to ADC members, covering virtually every area of defense practice: toxics, public entities, transportation, employment, civil procedure, and much more. These bills will be reviewed by the Board of the California Defense Counsel, the political arm of the ADC and your sister organization in the South, in advance of committee hearings commencing in the spring. But one key proposal from prior sessions has been reintroduced, broadening the state sales tax to services.

The bill for 2017, Senate Bill 640, is once again carried by former Assembly Speaker and current state Senator Robert Hertzberg (D-Van Nuys). Senator Hertzberg's intellect and energy make him a formidable author for a proposal such as this. He is also a member and former Chair of the Senate Governance and Finance Committee, where the bill will likely have its first policy committee hearing.

SB 640 begins with a series of legislative findings, some of which are uncontestable. It is certainly true, for example, that "California's tax collections are heavily dependent upon its top earners." Basically the top 1% of filers pay half of the state's personal income tax receipts. Because the income of these filers is so heavily dependent on the stock market and resulting capital gains, small dips in the economy can result in major fluctuations in revenues.

It also is true that recent decades have seen a major shift in state tax revenues from sales and use taxes to personal income taxes. As the economy has transitioned away from manufacturing and towards services, the percentage of revenues resulting from sales had dropped quite significantly. Now, personal income tax receipts account for about 2/3 of all state tax revenue.

There is an enormous leap, however, from correctly identifying structural problems in the tax system to broadening the sales tax base to virtually every service in California. Overnight, every business offering services in California will simultaneously become both sales tax collectors and remitters, and payers on the services which they themselves consume. The logistical, enforcement, and policy implications are staggering.

At this point, SB 640 has not fleshed out answers to the many questions raised by the concept of broadening the sales tax base. The bill indicates an intent to exempt from the services tax

*Continued on page 37*


SHURE

# Meet President Enrique Marinez – a Man Who Epitomizes Success

**David M. Daniels**
**ADC Immediate Past President**
**Gilbert, Kelly, Crowley & Jennett, LLP**

The famous soccer player, Pele once said, "Success is no accident. It is hard work, perseverance, learning, sacrifice and most of all, a love for what you are doing or learning to do." Enrique Marinez is a man who, with little doubt, epitomizes the meaning of success. He is a wonderful father, a loving husband, a partner in his firm, a hard worker, a wine connoisseur, a true renaissance man and now the President of the Association of Defense Counsel of Northern California and Nevada. Please allow me to introduce him.

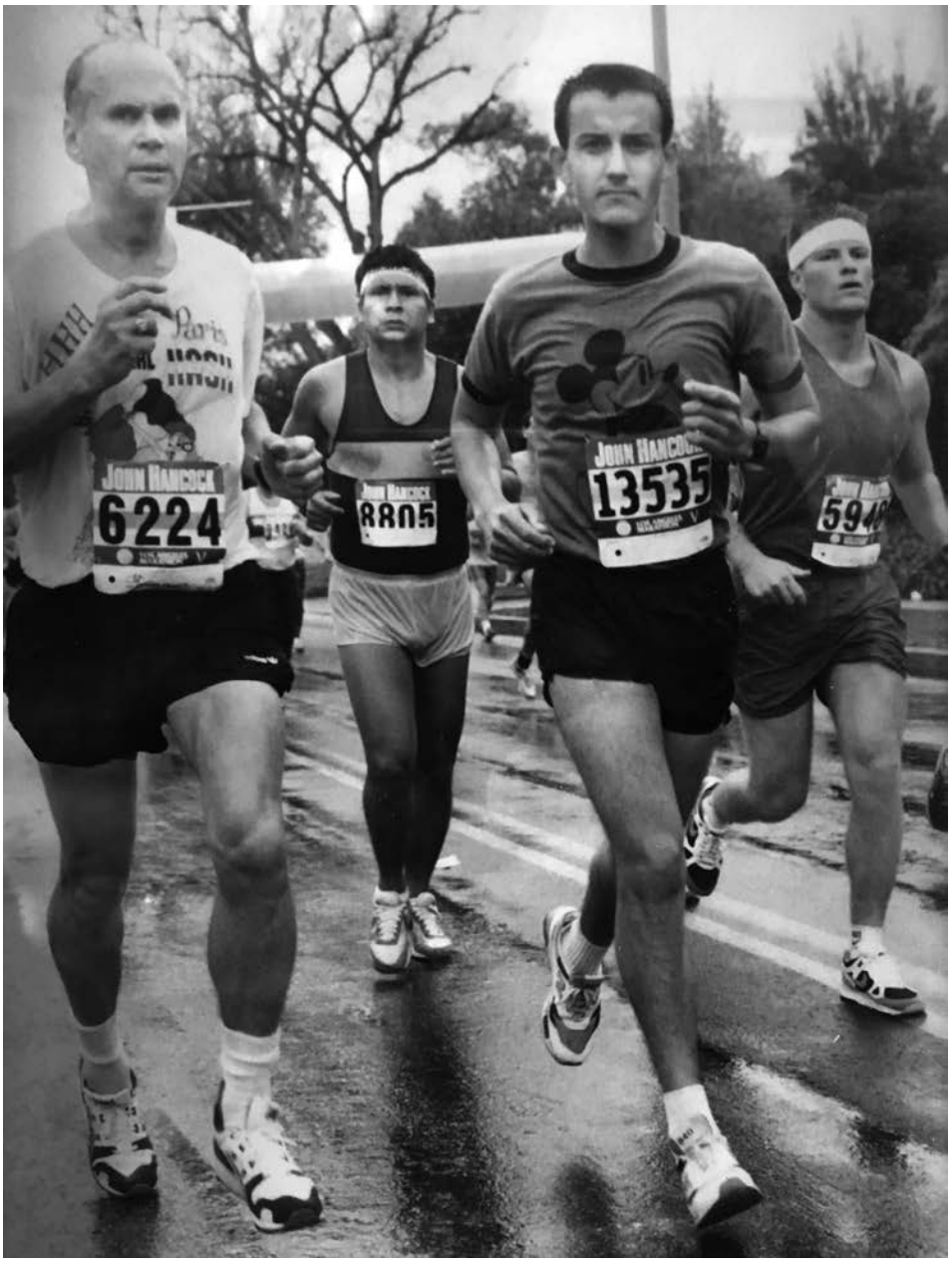
Enrique was born in Morelia, Michoacán, Mexico. His father was a participant in the United States Bracero Program in the late 50's and early 60's and was able to obtain U.S. residency for his wife and two children Rosario and Enrique resulting from participation in the Bracero Program. The Bracero Program, terminated in 1964, grew out of a series of bilateral labor agreements between Mexico and the United States that allowed millions of Mexican men to come to the United States to work on short-term, primarily agricultural, labor contracts.

At the young age of three, Enrique immigrated to California as a "resident alien" and his family settled in Watsonville where he grew up and attended Watsonville High School. Enrique's father had worked in the agricultural strawberry and lettuce fields of Watsonville and Moss Landing. As he grew up, Enrique, at times, also worked picking strawberries and apples. The work ethic required to balance work and school served to shape Enrique's tireless work and dedication to any task he undertakes. Although working was paramount, Enrique's parents, who had only grade school education, emphasized the only way their children would avoid manual labor work was to focus on education as an avenue to advance.

*Continued on page 6*

In 1983, Enrique began attending Occidental College in Los Angeles, and graduated in 1987 with a degree in Economics. Oxy was instrumental in shaping Enrique's ability to voice his opinion, despite many times being the less popular and politically correct point of view. During college, he attended a semester at American University in Washington, D.C. and worked as an intern at the U.S. Chamber of Commerce directly across from the White House. His work on the environmental Superfund Program was published in the U.S. Chamber of Commerce quarterly publication. During his senior year, he was a Resident Advisor in one of the school's dormitories, a position that was tremendously fun and rewarding.

Upon graduation, Enrique began what he thought would be a career in finance and business, never even contemplating law school. He began working at Wells Fargo through its officer training program and ultimately became a branch operations manager. Enrique's roommate began attending law school and a year later, Enrique, enrolled at Whittier College School of Law. It was the best decision he ever made. Not only did he obtain a law degree but he met the love of his life in fellow student, Jennifer, ironically in their community property class, where Jennifer boasts that she obtained a higher grade than Enrique. Enrique describes law school as some of the most fun three years of his life. While in law school, he perfected his golf game, ran marathons, all the while excelling as an editor on the Law Review and graduating Cum Laude.




Los Angeles Marathon, March 4, 1990

Enrique started his legal career with the Los Angeles County Public Defender's office. For six years, Enrique appeared in many LA County courtrooms, trying countless jury trials, often picking a jury while another jury was deliberating on the previous case. It was tireless, thankless and emotionally taxing work, but rewarding and offered invaluable experience and a comfort level of stepping into a courtroom and knowing "this is my playground."

Upon leaving the public defender's office, in 1998 Enrique was hired by Ropers, Majeski, Kohn & Bentley, as an associate in its Redwood City office. The transition from a criminal defense attorney to a civil litigator was difficult. Immediate questions were, "what is an interrogatory," and "why does a file take up an entire file room that we call a war room?" As Enrique remembers, at the public defender's office he was used to a few manila folders making up the "file." Enrique recalled that his first assignment at Ropers Majeski was to travel to Los Angeles and take several depositions. The partner told him to have the copy room make three copies of the anticipated exhibits. Enrique, used to making his own copies, preparing his own trial exhibits as a public defender, mused, "I get to have someone make copies for me, wow I have hit it big time."

In 2002, Enrique became a partner and continues to be a partner, now including participation in the firm's management, including serving as a member of the Board of Directors and acting as General Counsel for the Firm. Enrique's practice focuses on general business litigation with an emphasis on insurance coverage and bad faith defense of insurance carriers. He attributes his success to the hard work he grew up with and how he applies it to each and every aspect of his current

*Continued on page 7*

practice. Enrique is proud to continue the RMKB tradition of ADC presidents as he is the fourth ADC President from the Ropers firm. (Gene Majeski, Mike Brady and Mark Bonino). Even though the legal profession was not something he initially contemplated, it has proven to be the right choice for Enrique as it has given him the platform for a voice to be heard to help others and a fulfillment of his parents' dream to have their children use education as means to avoid the manual labor jobs they had to endure.

Enrique and Jennifer live in Union City with their two sons, Wilson and Matthew. Wilson is a junior at the University of Alabama and a member of the Alabama weightlifting team and enjoys rooting for Alabama football, where "Roll Tide" is the equivalent of saying hello. Wilson is majoring in Criminal Justice, works at a law firm, and has his sights set on law school. Matthew is a senior at James Logan High School in Union City where he is a four-year athlete in cross country and track and field and is excited to attend college with an interest in Marine Biology.


Wilson Marinez

Enrique enjoys being physically active having run in several marathons and half marathons. He does yoga and is aiming to participating in a century bicycle ride (100 miles), although he had a recent set back after breaking his hip in a bike accident while on a training ride. Enrique has a love of wine and is constantly looking for that diamond in the rough. Like wine, Enrique's practice and life has evolved and has gotten better with age.

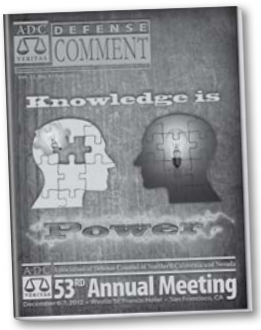
I have had the pleasure to know Enrique for many years. He has taught me and many others that success isn't just about what you accomplish in life, but rather it's what you inspire others to do in life. Our new 2017 President has inspired many and will continue to inspire many more to achieve their highest goals. Keep on inspiring others Enrique!

Matthew Marinez

Enrique, Wilson, Jennifer, and Matthew Marinez

# DEFENSE COMMENT

# Accepts and Publishes Readers' Articles and Trial Success Stories









## Do you have an article or trial success story to share with readers?

**We will endeavor to publish your article or trial success story in an upcoming edition of the *Defense Comment* magazine (space permitting).**

**Please include any digital photos or art that you would like to accompany your article or submission. All articles must be submitted in "final" form, proofed and cite checked. Trial success submissions should be short and limited to less than ten (10) sentences.**

**All submissions should be sent to *dlevy@smcgov.org* and *ellen@arabian-leelaw.com*.**







# Significant Changes to California's Proposition 65's Warning Requirements that Businesses Need to Know

**Joshua J. Borger**
**Gates Eisenhart & Dawson**

California's Proposition 65 requires businesses to provide a "clear and reasonable" warning to individuals before exposing them to a chemical known to the State to cause cancer or reproductive toxicity.[1] A person may be subject to fines, civil penalties, and injunctive relief if he exposes a person without providing the requisite warning.[2]

On August 30, 2016, California's Office of Environmental Health Hazard Assessment ("OEHHA"), the regulatory entity charged with implementing Proposition 65, repealed the existing regulations for providing "clear and reasonable warnings" and adopted new and significantly different regulations.[3] These new regulations may lead to an influx of lawsuits from plaintiffs' lawyers. Businesses that sell consumer products in California must be aware of these changes and redesign their Proposition 65 warnings to avoid future lawsuits.

## SIGNIFICANT CHANGES TO THE CONTENT OF THE WARNING

A few of the regulations remain the same. Under both the existing and new warning regulations, businesses may use "safe harbor" warnings which are deemed to be "clear and reasonable" under the statute.[4] However, the content of the "safe harbor" warnings and the manner in which these warnings are conveyed changed dramatically.

The previous warning regulations permitted a business to state that the product contained "chemical[s] known to the state of California" to cause cancer or reproductive toxicity without naming a specific chemical.[5] Businesses can no longer insulate themselves from liability by issuing blanket warnings without identifying a specific chemical.

To fall within the "safe harbor" provisions, businesses of consumer products must now identify at least one chemical that the product contains.[6] A warning for reproductive toxicity must identify at least one chemical listed as a reproductive toxicant that is present in the product; a warning for a carcinogen must identify at least one chemical listed as a carcinogen that is present in the product.[7] All the chemicals need not be identified. The business is protected from liability for all the chemicals of the same endpoint (i.e., cancer or reproductive toxicity) provided at least one chemical is identified. Yet, a company cannot protect itself from liability for an unnamed carcinogen by naming, for example, a chemical and listing it as a reproductive toxicant. The warning must also state, "For more information go to *www.P65Warnings.ca.gov,"* which is a newly launched website set up by OEHHA that provides further details on Proposition 65.[8]

A "safe harbor" warning for consumer products must also contain the following: (1) a symbol consisting of a black exclamation point in a yellow equilateral triangle with a bold black outline.[9] Where the product label does not use yellow ink, the symbol may be in black and white, and must comply with a number of other requirements regarding font size and bolding;[10] (2) The word "WARNING" must be in capital letters and bold print;[11] and (3) includes specific warning language that states that the product "can expose you to chemicals...." The prior regulation permitted the warning to state that the product "may expose you...."[12] If any consumer information on the product sign, label or shelf tab is provided in another language, then the warning must also be provided in that language.[13] There are exemptions from certain requirements. For example, on-product warnings are not required to include the name of any chemical.[14]

The new "safe harbor" warnings contain instructions for specific categories of products (*i.e.*, food exposure, alcoholic beverage exposure, food and non-alcoholic beverage exposure for restaurants, prescription drug exposure and emergency medical or dental care exposure warnings, dental care exposure, raw wood product exposure, furniture product, diesel engine, vehicle exposure, recreational vessel exposure).

*Continued on page 10*

## BURDEN OF PROVIDING THE WARNING: RETAILERS VERSUS MANUFACTURERS

The new regulations are intended to ease the burden on retail sellers of consumer products except where the retail seller itself is responsible for introducing a listed chemical into the product.[15] The new regulations allow a manufacturer, producer, packager, importer, supplier, or distributor to comply with the warning requirements by affixing a label to the product, or by providing written notice to the retail seller's authorized agent and including certain information and items such as compliant labels and signs.[16] If written notice to the retail seller's agent is used, the notice must be renewed annually, and additional notice to the retail seller is required within ninety days when a different or additional chemical or endpoint is included in the warning.[17] Provided the consumer receives a warning, the parties may enter into a written agreement on the allocation of responsibility for the warnings.[18]

The new regulations contain requirements for warnings on the internet and purchases via catalog. For internet purchases, a warning that complies with the new content requirement must be provided by including either the warning itself or a clearly marked hyperlink using the word "WARNING" on the product display page.[19] For catalog purchases, the warning must be provided in a manner that clearly associates it with the item purchased.[20]

## TIMELINE FOR THE CHANGES

The new regulations will be effective on August 30, 2018. In the interim period, businesses may comply with the existing regulations or the new regulations.[21]

The new regulations also address concerns regarding existing inventories that comply with the existing warning regulations. Consumer products manufactured prior to the effective date of the new regulations that comply with the existing warning regulations are sufficient to comply with the new regulations.[22] Any warnings approved by a consent judgment before the effective date of the new regulations are sufficient to comply with the new regulations.[23]

**Joshua J. Borger**

*Joshua J. Borger, is an attorney at Gates Eisenhart & Dawson in San Jose, where he specializes in business litigation and transactional work. He received his bachelor's degree from Muhlenberg College, and his law degree from Boston College Law School.*

## ENDNOTES

1 Cal. Health & Safety Code § 25249.6

2 Cal. Health & Safety Code § 25249.7

3 The existing warning regulations were repealed except the regulations that were added by an emergency rulemaking in April 2016, which related to warnings for exposures to bisphenol A in canned foods and beverages. Cal. Code Regs. tit. 27, §§ 25603.3(f), (g).

4 Cal. Code Regs. tit. 27, § 25601

5 Cal. Code Regs. tit. 27, § 25603.2

6 Cal. Code Regs. tit. 27, § 25603(a)(2)(A)-(D)

7 Cal. Code Regs. tit. 27, § 25603(a)(2)(A)-(D)

8 Cal. Code Regs. tit. 27, § 25603(a)(2)(A)-(D)

9 Cal. Code Regs. tit. 27, § 25603(a)(1)

10 Cal. Code Regs. tit. 27, § 25603(a)(1)

11 Cal. Code Regs. tit. 27, § 25603(a)(2)

12 Cal. Code Regs. tit. 27, § 25603(a)(2)(A)-(D)

13 Cal. Code Regs. tit. 27, § 25602(d)

14 Cal. Code Regs. tit. 27, § 25603(c)

15 Cal. Code Regs. tit. 27, § 25600.2

16 Cal. Code Regs. tit. 27, § 25600.2(b)(1)-(4)

17 Cal. Code Regs. tit. 27, § 25600.2(c)(1)-(2)

18 Cal. Code Regs. tit. 27, § 25600.2(i)

19 Cal. Code Regs. tit. 27, § 25602(b)

20 Cal. Code Regs. tit. 27, § 25602(c)

21 Cal. Code Regs. tit. 27, § 25600(b)

22 Cal. Code Regs. tit. 27, § 25600(b)

23 Cal. Code Regs. tit. 27, § 25600(e)


# DOG BITES AND PET-RELATED INJURIES: Keeping Your Dog Bite Case On a Short Leash

**Ron Berman**
**Expert Witness and Consultant**

Dog bites and pet related injury claims to insurers have risen substantially over the years. The value of claims according to the Insurance Information Institute jumped from $324 million in 2003 to $571 million in 2015, a 76.2% increase. California accounted for the largest number of claims in the U.S. in 2015 at 1684 with a total value of $75.8 million. State Farm has determined that one third of all homeowners liability pay outs in 2014 were for dog bites and although the actual number of claims decreased by 4.7 percent, the average cost per claim was up by 15%. Plaintiff demands for $1,000,000 or more are not uncommon in dog bite cases. A recent New Jersey case in which a 5-year-old girl was bitten in the face by a dog up for adoption settled for a total of $900,000 well before trial.

Despite strict liability statutes in most states, which create liability in the absence of *scienter,* negligence or intentional behavior, it is still possible to successfully mount a solid defense and mitigate potential losses using in-depth forensic investigation as well as the science of canine behavior and bite wound evaluation. Even though strict liability may apply, issues of provocation can turn a case upside down and at times end with substantial comparative fault being given to the plaintiff at trial. Cases involving third party landlord/tenant issues or pet related injuries not involving dog bites, such as knockdowns or fright cases, can present a whole host of other difficulties.

Eyewitness accounts of the very same incident can be inconsistent, and because dog bites can happen in the blink of an eye, it is not surprising that witnesses are not always clear about how the incident happened or why. Even when the parties' descriptions of events seem to be clear, their descriptions of what happened are not always supported by the evidence. Pet owners, in litigation, are not always truthful about the aggressive history of their dog and may state that their beloved pets have never even growled prior to this incident. Similarly, bite victims also have been known to misrepresent the facts and change their version of what happened in order to avoid questions about any potentially provocative behavior occurring just prior to the bite. Plaintiffs sometimes overstate their accounts of the incident by increasing such factors as the amount of time the attack lasted, the number of times they were bitten and the intensity with which the dog bit. Once litigation starts, it isn't unusual for a plaintiff who was bitten on the face while on his knees trying to kiss a dog he didn't know to change his account of the incident and testify that he was standing up and the dog jumped up and bit him for no apparent reason. Statements that the dog shook the victim, a factor in predatory aggression, are often inconsistent with the bite wounds which can sometimes also show that the plaintiff's wounds are not from a dog bite at all.

Although there are many good sources of evidence in a dog bite or pet related injury case that can be used to mount a solid defense, there are two in particular that often are the most reliable: the dog and the bite wounds.

## THE DOG

There are three things about dogs that make them very important evidence: *1) Dogs are creatures of habit; 2) A dog's temperament doesn't change over time; and 3) Dogs do not lie or change their behavior because they are involved in litigation.* Typically, a dog's behavior can change due to old age, illness or injury, or if trained or had his behavior modified after an incident, but their temperament does not change over time. That is why a professional forensic evaluation of a dog is valid even years after the incident. A non-aggressive friendly dog will always have a non-aggressive temperament. Also, if a dog is friendly at the door or towards strangers on its territory, that behavior will likely be ritualized with time and repetition, making the same behavior highly likely to show up in an evaluation whenever it is done as long as it is done properly.

Below are areas regarding the subject dog that deserve more than a superficial review as they may be very important in both establishing your defense:

**1) Breed:** Many plaintiff attorneys litigating a dog bite case believe that if the defendant's dog is an "aggressive breed" such as an American Staffordshire Terrier,

*Continued on page 12*

or other breed commonly called a "pit bull", that their case is in the bag. However, this may not help their case unless it is being tried in a state or county in which "pit bulls" have been declared a dangerous or vicious breed.

The defense should counter by focusing on the fact that every dog is an individual and that its breed is only one factor out of many that may be important. A forensic investigation and evaluation can offer a jury a very different picture of the dog than the one the opposing attorney will try to paint. If opposing counsel has not done her homework and she attempts to stress the dog's breed as an "ace in the hole," then she may be surprised at the jury's response.

"Pit bulls" are no longer dogs soley for inner city neighborhoods and gang members. Now, they can be seen being walked in Beverly Hills and other enclaves of the rich and famous. America both loves and hates "pit bull" terriers and an "attack" on the breeds that make up this group can be met with just as much resistance as support.

**2) Sex:** Intact (un-neutered) male dogs are involved in 70-76% of reported dog bite incidents (Wright J.C., Canine Aggression toward people: bite scenarios and prevention. Vet Clin North Am Sm Ani Pract 1991:21(2):299-314).

**3) Age/Health:** In certain breeds, males are much more aggressive between 1-3 years of age. Also, older dogs can become aggressive due to painful physical issues like hip dysplasia or eye issues like glaucoma. Claims that older dogs, in poor health, ran up to the victim and jumped up on them are typically meet with strong resistance from the defense. A recent serious injury case went up in smoke when the victim testified about how her neighbor's Siberian Husky ran full speed down the driveway and leaped at her, causing her to fall. Veterinary records, witnesses and expert testimony presented to the jury led to a defense verdict when it was revealed that the dog was partially crippled and nearly 20 years old at the time of the incident. The average lifespan of a Siberian Husky is 12-15 years at the most. The plaintiff's attorney did not seem to be aware of this when his client's deposition was taken.

**4) Size:** Large breeds can cause more damage especially when the incident involves a child. Check the dog's veterinary records at the date closest to the incident for the dog's weight. In dog-on-dog aggression cases, where a person is bitten, the facts about each dog, including size and weight, the dynamics of how the incident happened, and who was the aggressor can be important. Sometimes, even though the defendant's dog is the larger dog, it might have a very benign temperament and no previous aggression in its history.

**5) Behavioral History:** Individual behavior history is extremely important as each dog is an individual within a breed and may not present all or any of the characteristics commonly attributed to that breed. An in-depth investigation into the defendant's dog's temperament and previous behavior is a must.

If your client swears to you that the beloved pet is a complete sweetheart and wouldn't hurt a fly, do an evaluation and find out for yourself. Owner denial, in spite of clear evidence to the contrary, is common and a prime factor in many bite incidents. It is best to find out early, before the plaintiff hires her own expert and demands production of the dog for evaluation. If that is the case, remember that not all experts are ethical and an unscrupulous opposing expert can attempt to provoke your client's dog into an aggressive display. Do not, under any circumstances, produce your client's dog unless you have your own expert present and the ability to record the entire evaluation from as many angles as possible.

**6) Types of aggression previously displayed:** There are numerous types of canine aggression such as dominance aggression, territorial aggression, protective aggression, maternal aggression, etc. Even if a dog has demonstrated aggression in the past, it can be problematic when used as support for the plaintiff's case, unless it directly relates to the incident being litigated. For example, dog-on-dog aggression does not relate to dog on human aggression. Having evidence that the defendant's dog has attacked other dogs or animals in the past will not carry much weight if the plaintiff's case is strictly dog on human aggression and plaintiff did not have a dog with him or her at the time of the incident.

If there is evidence that the defendant's dog bit someone who was trying to take his food away, that evidence will only have weight if the plaintiff was bitten in the presence of food. If he or she was attacked while walking down the street or riding a bicycle, showing a history of food aggression may not support their case.

In fact, a dog that is food aggressive may not be aggressive in any other situation. Also, previous incidents which the opposing attorney is relying on may not be as valuable as they think, due to the fact that the dog was provoked. A dog is only "vicious" if it attacks without provocation.

When looking at previous incidents reported or unreported, interviews of witnesses regarding all incidents should be performed by your expert as investigators typically do not have the knowledge needed

*Continued on page 13*

to ask the right follow-up questions or clarify specific terms regarding dogs often misused by the general public. Also, your experts can rely on "hearsay" evidence even if, after their one and only interview, the person suddenly decides they no longer want to be involved, moves to another state, or simply disappears.

**7) Socialization:** Dogs that are not well socialized, especially as puppies, have a higher likelihood of aggression. This should be explored early in the case.

**8) Inside/Outside:** Dogs that are kept outside and not allowed into the home are typically poorly socialized and more likely to demonstrate aggression towards strange people and dogs. However, your client's outside dog might be an exception to the rule and be a total sweetheart. This is a reason to capture the dog's friendly nature in an evaluation video which can be shown at trial with behavioral commentary by your expert.

**9) Chaining:** Dogs that have been chained for long periods of time have been shown to be three times more likely to bite. *(PETA.org)* Typically, the victims of chained dogs are children. In addition, some states like California have laws against chaining a dog for more than 3 hours at a time. Even if a dog has been chained, it doesn't mean for a fact that it is dangerous or vicious, but this issue does need to be explored early on.

**10) Stray or Rescue:** Stray dogs or rescue dogs can be wonderful pets but many have behavior issues which may be the reason that they are on the street or put up for adoption. Previous owners sometimes don't tell the rescue organization about aggression issues because they are afraid that the dog will be euthanized. Time bombs often can be found either in the rescue organization's records or shelter records. These records can be utilized to discover further evidence of the pet's misbehavior. Therefore, it is best that this avenue be explored early in the litigation.

**11) Training:** Previous aggression may be one of the main reasons why the defendant's dog has been professionally trained. The trainer can be an excellent percipient witness regarding the dog's prior behavior and what the defendant knew about the dog prior to the day of the incident. If the dog had aggression issues, then you need to know. If not, then the trainer can give a statement or deposition on your client's behalf.

**12) Leash:** Most cities have leash laws, but many cities also require that the leash not be over six feet long. If your client's dog was being walked on a retractable leash which was extended over six feet, then it might be important in establishing owner/handler negligence. A lot of incidents happen when dogs are off leash either illegally or legally in a dog park, where dog owners typically must have voice control over their dogs. Does your client have off leash voice control over their dog? If they claim that they do, then they need to prove it.

**13) Exercise:** Under-exercised dogs can build up tension that can either fuel or intensify aggression.

**14) Aggressive Behavior:** Canine aggression involves growling, snarling, lunging, snapping and biting. Barking is not necessarily aggressive behavior, but based on tonality and other exhibited behaviors it may be construed as such. It is important to clarify the dog's tone, body language, etc., in order to determine if aggression was actually what was being displayed. For example, what many people would call a snarl (showing teeth) , aggressive behavior, might actually be a greeting grin," which looks similar but is the opposite of aggressive.

## BITE WOUNDS

It is very important that the plaintiff's bite wounds support their account of the incident. Typically, the main issues in a dog bite case include: 1) are the plaintiff's wounds from a dog bite; 2) whether the defendant's dog is the dog that bit the plaintiff; 3) whether the attack happened as the plaintiff describes; and 4) whether the plaintiff provoked the dog into biting him or her.

Bite wounds are an actual physical representation of the incident. They stand alone as evidence even if the plaintiff was the only witness and the dog has been euthanized. If the wounds are not consistent with the plaintiff's account or in some cases with a dog bite at all, then his or her credibility should be questioned in great detail.

Dog bites typically present as punctures, lacerations, avulsions and abrasions. As bites are by nature crush injuries, deeper wounds often are accompanied by contusions (often cited as ecchymosis in the victims medical records), otherwise known as bruises caused by broken blood vessels around the central wound.

## DOG BITE OR DOG ATTACK

Although all dog bites are serious from a medical standpoint and even by an emotional standpoint due to the potential long term damage they can do to the victim, there is a motivational difference

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between offensive and defensive aggression that shows up in the dynamics of the attack as well as the type, depth, location and number of bite wounds. All bites are an aggressive display, but a dog that is provoked into defending itself and responds with a quick inhibited bite is qualitatively a different dog than one who runs up to and attacks with multiple deep punctures over different parts of the victim's anatomy and has to be pulled off the victim. Plaintiff attorneys often use the word "attack" in their settlement demands and complaints. If the evidence does not support this claim, then your expert should be able to neutralize the emotional power that such words inherently convey to a jury.

### Defensive aggression

Dogs bite defensively as a reaction to pain or to "avoid" a threat from a person who has provoked them. This could be by stepping on their tail or paw or by putting their face very close to a strange dog's face in an attempt to kiss or hug them, which will often result in one inhibited bite. Inhibited bites are where the dog controls its severity. In these cases, the dog is simply trying to remove a threat. One quick bite usually succeeds in creating enough distance between the dog and the threat and no further aggression is displayed. They also tend to produce only lacerations and abrasions and occasionally contusions caused by blunt force trauma as a result of the direct contact of the dog with the victim. Medical records also can be confusing if one doctor states that a wound is a puncture and the next cites it as a laceration. Clarity about the wounds is imperative.

### Offensive aggression

Offensive attacks, typically but not always, involve multiple bites and often to different parts of the body. They can be provoked, based on the specifics of the incident and whether or not the dog's level of aggression was grossly out of proportion to the actions of the victim. However, most are unprovoked, meaning that the victim's actions just prior to the incident would not be considered something that is likely to cause a dog to bite. A particular dog, due to one or a combination of factors such as poor socialization and fear aggression may interpret an outstretched hand as a threat and bite it, but in the eyes of the law a friendly and common gesture such as reaching out to pet a dog is not provocation. (*Ellsworth* v. *Elite Dry Cleaners, Inc.* (1954) 127 Cal.App.2d 479 – walking toward a dog does not constitute provocation; *Chandler* v. *Vaccaro* (1959) 167 Cal.App 2d 786.)

## ATTACK DYNAMICS

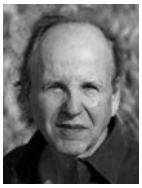
There are often reasonable explanations as to why a particular wound pattern does not seem to add-up but these answers are typically only available through expert opinion after a thorough analysis. For example, where a stranger trying to kiss or hug a dog would clearly be provocative, the same person who is very familiar with the dog and who has kissed and hugged the dog on numerous prior occasions (with no warnings or aggressive response) may not meet the criteria of provocation due to their history with the dog accepting the behavior. Still an explanation why the dog bit on this occasion and not on others should be investigated as other actions by the plaintiff may have caused this seemingly "abnormal" reaction.

Provocation can be intentional, like kicking or hitting a dog, or unintentional, such as a person not very familiar with the dog initiating rough play. While the victim of the bite likely did not intend to threaten or hurt the dog, nevertheless his actions could be viewed as likely to cause a dog to feel threatened and bite. Dog bite incidents often are the culmination of a complex interaction that on the surface can appear confusing at best. Each dog, victim and incident is unique. All the facts should be reviewed and interpreted before a decision on whether the victim provoked the dog or not can be accurately made. In most cases, this requires an expert opinion after a complete forensic investigation and evaluation of all relevant discovery.

## EXPERTS

There are only a handful of self-titled dog experts in the United States who have more than a very limited amount of experience in court. Many more would like to act in an expert capacity and offer their services without the background needed to insure that the attorney who hires them gets the high level of service they expect. Your expert should know exactly what documents you need and what actions need to be taken in order to maximize all discovery options. Also, the expert needs to know how and where to find evidence not readily available through normal channels. Lastly, a good expert knows how to complete those tasks in a professional manner that does not create impeachment opportunities when facing an aggressive cross examination. Experts that only review what is sent to them by attorneys and do not do their own independent investigation can appear to be nothing but "hired guns."

Dog experts' experience and training vary greatly. Some offer opinions on dogs trained in aggression, such as police dogs and guard dogs, but have no actual experience training dogs in Shutzhund, developed in Germany where nearly all police dogs are trained and sometimes have no experience in aggression training at all. In one case, a plaintiff's expert testified regarding a bite incident that happened during a training class when a specific training exercise was taking place. His opinion was that the exercise was dangerous and should never have been used. His testimony fell apart when it was revealed that his doctorate had nothing to do with dogs and that he had never taught a dog training class. Even worse, he had no experience teaching the specific exercise to which he so strongly objected.



**Ron Berman**

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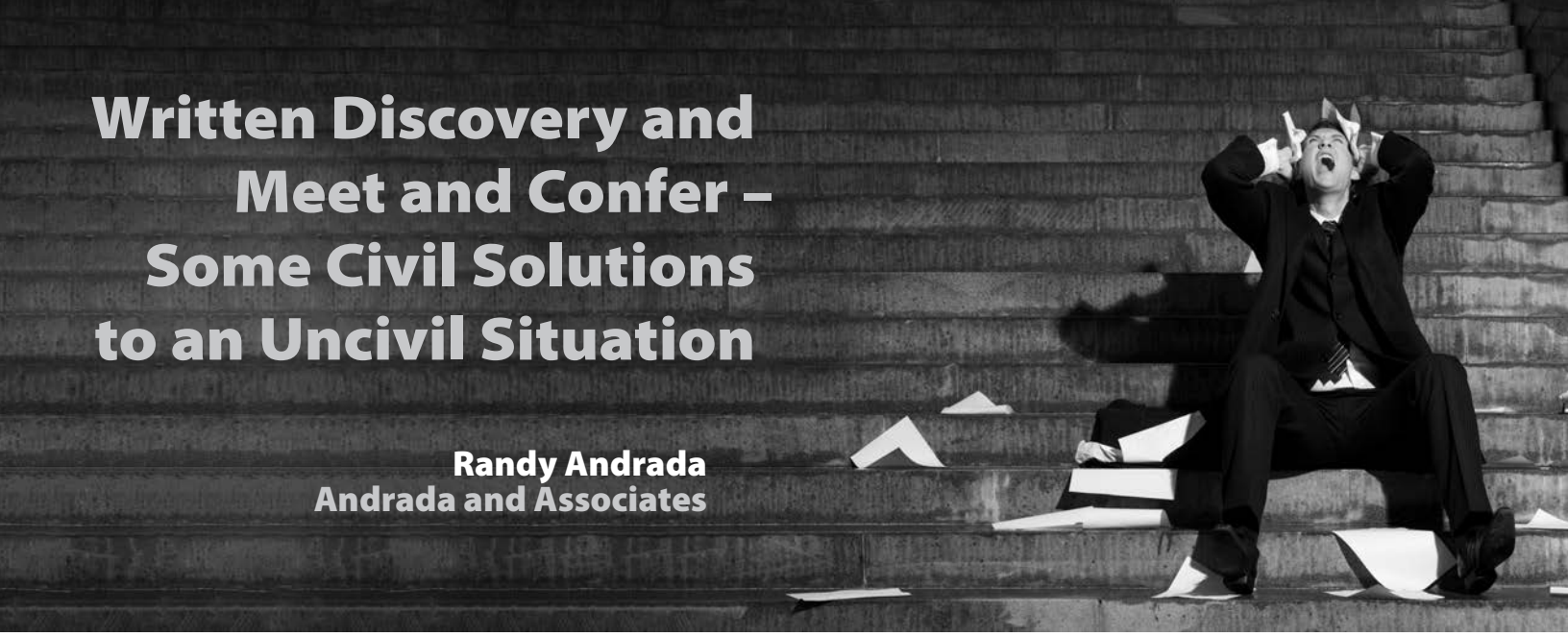
# Written Discovery and Meet and Confer – Some Civil Solutions to an Uncivil Situation



**Randy Andrada**
**Andrada and Associates**

The following constitutes a primal scream that is polite, restrained, reserved, and just gosh-darn civil. Ladies and Gentlemen of the bench and bar, one ancient trial lawyer declares the following to be a self-evident truth.

## WRITTEN DISCOVERY FAILS TO DISCOVER VERY MUCH

You don't need to be a gray-haired veteran to reach that conclusion. Written discovery[1] fails to accomplish its purpose. It is infinitely voluminous, frightfully tedious, and terribly expensive. Discovery has spawned an evil stepchild known as the twenty-page meet and confer letter. Too often, the letters glorify the trivial, rely upon personal attack, and numb the reader.

The third aspect of this ostensible pursuit of truth and justice, otherwise known as the discovery motion, creates its own set of problems. It repeats the name calling of meet-and-confer and then makes the loser pay from his own pocket. Too often, a motion, or even the threat of a motion, promotes anger, animosity, and the desire for revenge.

Now, to be clear, the writer is too respectful, courteous, and thoughtful to declare that all written discovery and all meet and confer efforts are futile. But it sometimes sure seems that way. It is enough to set forth a few examples of the excess of which we speak.

**EXAMPLE:** A hospital and 18 administrators who had nothing to do with the care were named in an elder abuse-malpractice action based upon an alleged slip and fall that actually had never occurred. The defendants were buried in a discovery barrage that included a total of 81 form interrogatories, 126 special interrogatories, 114 requests for admission, and 162 document demands. One special interrogatory was literally one pleading page in length. One document demand had 12 subcategories. Another ran 21 lines. There was a footnote that ran 15 lines in 8-point font.

Counsel for the hospital responded as best he could. The inevitable meet and confer letter quickly followed. Portions of the letter were obviously borrowed from other actions because they referred to other cases in other counties involving other parties. It contained a footnote that ran eight inches. It provided the plaintiff's perspective on the problem: "The billable hour machinery [approach] ... which is so attractive to defense firms is not one which we countenance." It also contained the following admonition: "If you are too busy to attend to this file, the rules of professional conduct require you to substitute out of the case...."

The attorney to whom the letter was addressed had indeed been busy, because he had been in trial. That fact was well known to the author of the correspondence. Then came the motion to compel and a demand for thousands of dollars in tribute, a.k.a. sanctions and fees.

**EXAMPLE:** A corporation and various employees were named as defendants in a vehicular negligent entrustment case. The plaintiff contended that liability was clear and the damages were in the millions. Truth be told, the case involved a soft tissue injury worth $25,000. It was eventually resolved in favor of the defense by summary judgment. The plaintiff immediately served 87 special interrogatories, 114 form interrogatories, 189 requests for admission, and 353 document demands on the remaining defendant. The defendants spent an ungodly number of hours preparing responses. The meet and confer letters began to fly. Then came the discovery motion, which included 800 pages of exhibits.

**EXAMPLE:** The plaintiff in a whistleblower employment action served 74 special interrogatories, 42 form interrogatories, 56 requests for admission, and 147 document demands. Various objections were made, and a 25 page meet and confer letter followed. The phrases "I sincerely hope...." and "humbly request" were sincerely and humbly used every few pages, and sometimes on the same page, as a prelude to a warning that monetary and evidentiary sanctions would be sought in order to emasculate the defense at trial.

After all, defense counsel had supposedly engaged in "endless gamesmanship." The games included making objections such as "vague and ambiguous" to various interrogatories. The meet and confer letter included a lengthy, esoteric, and, frankly, boring discussion about the nature of "vagueness" and "ambiguity."

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Per the plaintiff's attorney, the objections were frivolous, in bad faith, and a sad joke because, by definition, a question cannot be vague *and* ambiguous, but only vague *or* ambiguous!

All of us have such horror stories to tell. So, how did this happen? If I may be so presumptuous to state the following, please allow me to do so, with great respect for my brothers and sisters on both sides of the bar.

## THERE IS PLENTY OF BLAME TO GO AROUND

But being a champion of civility I am not here to offer cynical or sarcastic explanations, nor to make accusations. I am not here to argue that written discovery is often fee driven by certain folks on both sides of the bar. Nor are discovery requests in the hundreds are often motivated by an intent to scorch the earth. Likewise, I am not here to tell you that a painfully dull meet and confer letter of thirty pages is ever motivated by a desire to make an opponent so miserable that she will settle the case in order to save her sanity.

The writer is here to state the following: The virtues which characterize the civil man or woman – courtesy, moderation, and magnanimity, seem to have minimal effect upon how written discovery is conducted. This, dear readers, is most unfortunate.

Yet, engaging in written discovery and meeting and conferring with civility is an ethical requirement. It is also highly practical. A civil approach will more likely give you the intended result. That is to say, it will give you the information you actually need with less effort on your part, and, for those of us who bill our time, lower fees for our clients. I will provide some modest proposals to make written discovery and meet and confer more civil and more effective at less cost for plaintiffs and defendants. But first, some background.

## THE GOAL

The purpose of discovery is simple, but lost in an avalanche of paper. It is to provide attorneys with the information they actually need to settle or try the case, and to provide the information quickly and inexpensively. The veteran of 40 years and the novice of 40 weeks should approach discovery with the same end in mind. The question "what do I really need?" should be asked before each set of discovery is prepared.

## ETHICS

The State Bar issued its Guidelines of Civility and Professionalism on July 20, 2007. They include numerous sections dealing with discovery. Unfortunately, they remain a well-kept secret. READ THEM! Practice them. They make it clear that written discovery is a tool, not a weapon.

The Guidelines offer some specific directions regarding interrogatories:

- An attorney should narrowly tailor special interrogatories and not use them to impose an undue burden on an opposing party.
- An objection must be made in good faith. If an interrogatory is objectionable in part, an attorney should answer the unobjectionable part.
- An attorney should not intentionally misconstrue or answer interrogatories in a manner that is not responsive.

The Guidelines also provide some specific rules for document demands:

- An attorney should not intentionally misconstrue a request so as to avoid disclosure of a document.
- An attorney should not produce unintelligible documents, or produce documents so as to hide or obscure the existence of particular documents.
- An attorney should not delay in producing a document in order to prevent opposing counsel from reviewing it prior to or during a deposition.

The writer can already hear his critics: "That guy is quixotic. He is so 1979. His idea of harassment is my idea of advocacy. We needed every one of those 287 document demands, and I am glad we sent them." The counter-argument is merely a variation on the Golden Rule – given the realities of the case, what would be your reaction to receipt of the discovery that you just sent?

Now, with the Guidelines in mind, here are some Do's and Don'ts for written discovery.

## THE DO'S

A distinguished member of the plaintiff's bar, who has now gone to his eternal reward, used to speak the following words with awe and wonder in his voice: "It's amazing what you can learn if you just read the code." Dear friends, READ the code. That is to say, read the Civil Discovery Act, which begins at Code of Civil Procedure (C.C.P) §2016.010. At least read the following:

| | |
|---|---|
| 2030.010 et seq. | Interrogatories |
| 2031.010 et seq. | Document Demands |
| 2033.010 et seq. | Request for Admissions |

The senior attorneys who have tried cases also know the Evidence Code. Unfortunately, many young lawyers have no knowledge of it. Therefore, we say to the younger folks, read the Evidence Code as well. In short, read the statutes so that you will better know what you are talking or writing about.

Having read the code and thus learned the law, turn your attention to the notion of quality. By quality, I mean the following – make the discovery brief and make the discovery clear. Avoid double negatives, and strings of prepositional phrases. Remember, someday a discovery referee might be called upon to decide if your question or answer is intelligible. You don't want the judge to embarrass you in open court by stating on the record that "your opponent's argument is well taken. What is it that you are asking in these interrogatories?"

Likewise, it is all but forgotten that discovery can be read at trial. Imagine a jury's reaction to hearing or reading an interrogatory prepared by you that runs twenty lines!

Quality also refers to doing the necessary with efficiency. Compose the questions *quickly.* The "market," that is to say, your clients and the senior attorneys in your firm, will only accept so much time being spent on the work. I am convinced that as the quality of the discovery goes up, the

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number of interrogatories, requests, and document demands goes down.

Before you drop 100 questions on a lawyer you never met, from a firm you do not know, do something dramatic. Utilize an almost forgotten tool on your desk. We speak, of course, of the venerable land-line telephone. Pick it up and call her. If you do not know her, introduce yourself. Determine whether she already has a list of treaters or specials in hand. Inquire as to whether she has various medical charts or personnel records.

Declare your intentions to serve some discovery and indicate what you really need. It softens the blow of receipt if you advise your opponent that the discovery is coming. It also gives her the courtesy of a few extra days to locate the documents. It might give you an advantage as well. Imagine how the following will be received by the court in your procedural history in a motion to compel:

> This is a products case. I called counsel on April 5. I gave him a "heads up" that I intended to serve some discovery in a week or so that dealt with a particular aspect of the design. I told him generally what I needed. I mailed the discovery on April 12. He asked for an extension at 4:30 pm on May 17, the 35th day. I gave him until June 6. I finally received a written response on June 10. I got objections to every one of demands and next to no information. I know nothing more about the design than I did before the courtesy call on April 5.

If the situation presents itself, consider writing a letter that essentially states as follows: "I am enclosing a set of only ten interrogatories. I attempted to make this easy and less time consuming for you because I want to try to resolve the case sooner rather than later. However, I need *thorough* answers from you. Please give me what I need. It will actually benefit you because it will expedite resolution. Thank you."

If your opponent asks a legitimate question but somehow fails to comply with the minutiae of the code, you can make the objection, but then give him a straight answer. He will appreciate the courtesy. You will move the case forward.

Many, if not most practitioners include a lengthy introduction to their responses. The introduction often includes boilerplate language that certain objections are made to every interrogatory, request, or demand. Unfortunately, the C.C.P. does not explicitly provide for such introductions. Thus, strictly speaking, the boilerplate is ineffective. Most of the time it does not matter because, frankly, the introductions are seldom, if ever read.

With that in mind, what about entering into a *written* stipulation that all objections to form are reserved and need not be repeated ad infinitum and ad nauseum? You might consider additional stipulations to include other objections such as attorney-client and work product. This approach would eliminate useless goobledygook and turn many ten page responses into three page responses while preserving everyone's rights. The point of this paragraph is to stimulate discussion – how can we make introductions useful? We should be talking about it.

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The lawyer who signs the document should actually proofread the document. You don't want references to Federal Rule of Civil Procedure §33 in your state court set of interrogatories. You don't want references to the wrong parties. This is your opportunity to make certain that the interrogatories and requests consist of complete sentences that can be understood not only by the opposing party but also the judge and jury. A final proofreading will save you embarrassment and eliminate the "unintelligible" objection.

## THE DON'TS

Don't abuse the rule of 35. C.C.P. §2030.030 et seq. theoretically limits the number of special interrogatories to that number. However, §2030.040 and §2030.050 permit the service of additional questions if the case has "complexity." The attorney seeking the further discovery need only declare that, my goodness, "... none of the questions ... is being propounded for any improper purpose, such as to harass [the opponent or its attorney] ... or to cause unnecessary delay or needless increase in the cost of litigation." C.C.P. §2033.030 et seq. likewise limit the number of requests for admissions, but also provide the same "escape" mechanism.

Thus, the legislature envisioned that 35 interrogatories or requests would be the norm, with additional discovery being the exception. In reality, 35 or fewer is the exception. Are there cases that require more than 35 questions or requests? Of course, and you should by all means proceed accordingly. However, do you really need them in a small generic case? This writer doubts it.

Don't ask what I will euphemistically refer to as "poorly – considered" questions. For example, if you must send form interrogatories, do not ask a corporate defendant for its date of birth, educational background, and whether it is presently employed, or can read English. You might laugh, but lawyers make similar mistakes all the time. Such questions cause opposing counsel to waste his time. It makes you look sloppy. It also provides your opponent with a mechanism by which he can embarrass you. Consider the following argument by a defendant in opposition to your hypothetical motion to compel.

Plaintiff's counsel served a combination of 212 interroga-tories, RFAs, and document demands in a case with $10,000 in specials. Counsel sought the responses to the 3.1 – 3.7 "business entity" questions after he served a Government Code claim and received a "six-months to sue" letter from the City and County of San Francisco, the only defendant in the case. He then inquired as to whether the defendant public entity sustained a 6.1 injury and whether it consumed any alcohol immediately before the accident. The defendant provided satisfactory responses to 211 discovery inquiries. Counsel now moves to compel further production to document demand 89, which essentially seeks the same documents provided in the response to categories 82-88.

If you have the information, then don't ask for it again. If you have a hospital chart, a physician's chart, and employment records, and the plaintiff's date of birth is the same in each, you need to summon your courage and conclude that you don't need to send a date of birth interrogatory.

Do not duplicate the previous efforts of another party on your side. The law is clear that one defendant may use an answer or admission provided in response to the discovery of another defendant. See C.C.P. §2030.410 and Weil & Brown Cal. Prac. Guide: Civ. Pro. before Trial (The Rutter Group 2016) 8:1392. So, if there are five defendants in a case, and three sets of form interrogatories have already been served, save your client some money!

Avoid asking 15.1.[2] Okay, if you must ask, consider limiting the inquiry to a few specific affirmative defenses.

Don't stomp your feet and threaten motions to compel and motions for summary adjudication with regard to affirmative defenses that obviously do not apply just because the defendant responds in the third month of the litigation that it plead numerous affirmative defenses as a precaution, has not had an opportunity to develop various theories, and correctly claims that discovery is continuing. Exercise some restraint!

Similarly, if you are the plaintiff, avoid the 16s. At least wait until the defendant has conducted some discovery. Has anyone ever known a defendant to provide a substantive response to that series of questions in the early stages of a case?

Avoid asking 17.1. If you must ask it, and have sent a voluminous set of requests for admission, then consider limiting the 17.1 demand to a few critical requests.

Don't rearrange or manipulate documents and mislead your opponent as to how the records are maintained in the normal course of business. We all know that documents are often kept in a hodge-podge fashion. We have all been provided with records that appear to have been dropped on the floor and organized arbitrarily, only to eventually learn that the order in which we received them is the order in which they are actually stored in the cabinet or computer. Do the rules of civility require you to provide some order to the apparent confusion of the records and thus make it easier for your opponent? In our view, the answer is No. You should always be gracious, but you do not need to do your opponent's work for him. There is another practical consideration. You might be accused of intentionally creating more

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confusion. You might hear the following: "Counsel altered and spoiled the evidence, and I can prove it."

Don't give the other side grief and thus an excuse. The Grief Argument, on the defense side is as follows. "You put me through all of this grief ... you made me answer three sets of interrogatories, requests for admission, and you wrote those snarky meet-and-confer letters. We spent a lot of money on insignificant matters. Now, you want to be my friend and settle the case. You tell me that the carrier will spend money. For better or worse, your 'cost of defense' argument is too late. We already spent the money, and now you will need to spend YOUR money...."

The plaintiff's version is similar. "We could have settled this case at a discount because I didn't have much time into it ... but then you buried me with written discovery and a twenty-page meet and confer ... and then you filed that motion and wanted $3,000 out of my pocket. The cost to settle the case has gone up.... You blew your chance to get the case at a discount. You could have been a hero to your client. Now, it will cost them much more money...."

The "Don'ts" are easily summarized by the following sophisticated and erudite summary of the law: "Don't horse around the other side."

## MEET AND CONFER

If written discovery abuses are the illness and meet and confer letters the remedy, then we must regrettably conclude that too often the cure is worse than the disease.

First of all, take a time out before you take pen to paper, or more accurately, before your fingers touch the keyboard. Do some reading. You might want to review *Townsend v. Superior Court* (1998) 61 Cal. App.4th 1431. The case involved objections and attempts to meet and confer at a contentious deposition that was described by the court as a "prize fight"(pg 1438). The court essentially stated that its comments applied to written discovery as well. The court offered the following:

> We note with dismay the ever-growing number of cases in which most of the trappings of civility between counsel are lacking.... There [must] be a serious effort at negotiation and informal resolution.... Informal resolution ... requires that counsel attempt to talk the matter over, compare their views, consult, and deliberate.... Argument is not the same as informal negotiation.... Informal resolution ... entails more than bickering....[3]

We also refer you to *Clement v. Alegre* (2009) 177 Cal.App.4th 1277, which involved a full-scale battle about interrogatories. There were arguments regarding the term "economic damages." There were also disputes as to whether the questions were "self-contained," and other similar quarrels. The court affirmed a sanctions award of $6,632.50 against the plaintiff's attorney, and applauded defense counsel because "... he refused to be bullied ..." by the threats of his opponent.

Both cases cite Shakespeare, Henry IV, Part One, in which Henry Percy (Hotspur) spurned all efforts to peacefully resolve his disputes with the king, welcomed the drawing of blood, and paid with his life for his disdain of compromise. It should be remembered that the lust for battle can have disastrous results.

If you must write a letter, limit its length in your own head before you compose it. The preparation of a twenty-page letter is exhausting. Reading it is even worse. Assume that the letter will be submitted to the court. It might well be read by a judge before whom you have never tried a case or even made a live-in-person appearance. If you find the letter to be tedious, consider what Her Honor will think! We have never heard a judge praise anyone for presenting a lengthy letter. In contrast, brevity is acknowledged every day in every court with a smile.

*Continued on page 20*

Delete the smug, self-righteous smirk that you can literally see on the paper. Avoid personal attacks. They often read like this: "You and your firm are always hiding stuff, and you have been doing so for years ... I need the middle initial of that witness." Here is another one of our favorites: "Counsel, this is the fifth time that I have been compelled to write you, Counsel, a twenty-page letter, Counsel." One member of the ADC was warned in writing by a lawyer thirty years his junior that "your career is doomed" because some discovery was not satisfactorily answered. We are pleased to report that the defense attorney "survived" the warning of imminent professional destruction.

Do not include boilerplate lectures on the law. They insult the reader. No one needs a list of the twelve privileges set forth in the Evidence Code. You do not need to explain the distinction between "relevance" and "reasonably calculated" to a twenty-year trial lawyer. Do not string cite. No one needs a two-page quote from a case. No one needs every word in every subsection of every statute that might be applicable.

A savvy judge who eventually reads the letter will recognize such work product for what it is – a dull memo that you cut and pasted from several other cases, and for which you have previously requested fees.

Do not serve hundreds of discovery demands, send a series of 25 page meet and confer ultimatums, describe your opposing counsel as outlandish, outrageous, and out to lunch, seek $3,000 in sanctions, and then claim in one of those letters that your overworked and overwhelmed opponent who has been in trial is actually the harasser because she dared to make some objections! It brings to mind the word "chutzpah," and will not be well received by the court. (706)

## EXTENSIONS

I must comment on extensions and their fellow traveler, deposition continuances. We all know the hornbook rules – you should provide an extension, or agree to a continuance, unless it will prejudice your case. Similarly, you should provide an extension even if the requestor has previously been discourteous.

However, a lawyer needs to earn the favor that he seeks. Here is how to do so. Call (do not e-mail) opposing counsel early in the case and introduce yourself. Extend a courtesy if possible and create some good will. *Do not wait* until the last possible nano-second to seek an extension. It suggests that you are disorganized, not serious, or worse. You also risk placing your adversary in a terrible predicament. She wants to be courteous, but has her own client to consider. The claims manager or the nosy, eccentric plaintiff will be calling about the status of the case. Your opponent's counsel will need something substantive to report.

If you requested a courtesy, but never received a reply, do the obvious – follow up. "I sent a one-line email, and never got a response, and assumed everything was OK...." is not good enough.

## CONCLUSION

Being courteous in dealing with written discovery does not mean that you need to give opposing counsel a hug. The focus on civility is not intended to deter vigorous advocacy and a serious search for the truth. It is intended to promote fairness and efficiency.

Discovery is not an end in itself. Think quality, not quantity. A pox on twenty page letters. Don't thrive on trivia. Don't horse people around. Don't give people grief. It isn't civil or productive to do so.

**J. Randall Andrada**

*Randy Andrada is the principal of Andrada & Associates in Oakland, and has been a member of the Association of Defense Counsel since 1977. He received his BA degree from St. Mary's College, and his Juris Doctorate from U.C. Hastings. He states with pride that his bar number is 70000.*

## ENDNOTES

1 "Written discovery" refers to interrogatories, request for admissions, and document demands. "Written discovery" will often be referred to as "discovery" for ease of reference.

2 Form Interrogatories 15.1, 16.1 et seq., and 17.1 are titled Denials and Special or Affirmative Defenses; Defendant's Contentions, Personal Injury; and Responses to Requests for Admission; respectively.

3 The language is taken from the opinion, but the order of the phrases was changed for purposes of emphasis.

# The Perfect Family

**Justice James Marchiano**
**CA Court of Appeal, First District**

**EDITOR'S NOTE: In addition to having written numerous legal opinions, retired appellate Justice James Marchiano has penned a number of fictional stories. The stories are based on real-life cases that have been fictionalized and sometimes embellished. This story is based on an actual case that ended as written. *The Perfect Family* is reprinted with permission from the Contra Costa County Bar Association, and was originally published in the October 2014 *Contra Costa Lawyer* magazine, a publication of the Contra Costa County Bar Association. You can view the original online at: *http://cclawyer.cccba.org/2014/10/the-perfect-family/*.**

Nothing worked. Not the parents' pleas. Not the entreaties of the police. Not the failed Taser. And so Robert Anthony Whitney II lay dead on the floor in his parents' home. All of the rooms were in meticulous order except the family room where Robert ignored the officers' commands and charged at them with a cinder block used to support a bookshelf. The Taser struck him first but did not stop him. Then two shots from the police hand guns did. The parents did not understand how the officers could fire at their son. Their grief was boundless and inescapable and led to a wrongful death suit for excessive police force in Department 47 of the Bray Courts Building where a Contra Costa Times reporter followed the case.

Judge Raymond Carlton shifted in his chair, adjusted his bifocals, and looked over at the jury while listening to the plaintiffs' attorney's opening statement about the remarkable Whitney family. Plaintiff Colonel Robert Anthony Whitney, an honors graduate from West Point, was an eighty-year-old retired army band director, still able to stand perfectly tall, shoulders back, commanding respect. He was highly decorated, served with distinction in Vietnam, led a military band in Grenada and Kuwait, and directed the army band at several presidential inaugurations. He was devoted to Audrey his wife of fifty-six years who was the ideal military officer's spouse, a gracious, refined woman, perfectly coiffed and dressed. For their golden years, they retired to quiet Kensington, with its panoramic views and imposing homes for U.C. Berkeley professors and other professionals. They looked and acted how proper people would look and act.

Two years before, their fifty-two-year-old son Robert Whitney II joined his parents in Kensington, leaving his job as a senior accountant for San Bernardino County, to become the family chauffeur and grocery shopper since his parents could no longer drive. Neighbors rarely saw him because he stayed in the house constantly tending to his parents' needs like a caring son honoring his father and mother.

Robert suffered from bouts of anxiety that darkened his spirit. On a fall afternoon, after reading the mail, he turned up the volume of classical music playing in the family room and paced the floor. He became uncharacteristically angry, threatening, and could not be calmed. Colonel Whitney in desperation called 911 for help. When the officers arrived, the parents quietly went to the front yard to explain what was happening and told them about Robert's anxiety. They explained they had good medical coverage and would assist in having him seen at an emergency room if that would help.

Two officers went into the family room to assess the situation. Robert told them to leave and refused to talk with them. When the officers approached him, Robert picked up a cinder block, did not heed the officer's commands, and headed toward them, yelling at them to leave him alone. Futile negotiations ceased. The Taser failed. Impulsive shots reverberated in the room. The frantic parents did not understand why deadly force was used when the purpose of their call was for life giving assistance. Qualified law enforcement experts were prepared to testify the use of deadly force was below acceptable police standards. The parents' loss of society, comfort, and companionship of their only son was

*Continued on page 22*

immeasurable and irreplaceable. The totality of the evidence would support substantial damages, at least in the high six figures, for Colonel and Mrs. Whitney.

Defense attorney Daniel Freeman reserved his opening statement until the commencement of the defense case. He was at a disadvantage because the insurer for the officers restricted his discovery to minimize legal fees. Freeman needed to test the waters. The defendants' insurance company allowed Freeman to take depositions of the parents, subpoena the bare bones salary records from San Bernardino County, subpoena the decedent's medical records from Blue Cross/Anthem, hire an investigator to interview the neighbors, and hire a defense expert, but little more. Freeman sensed there was more to the case than a loving son shot by overreacting officers. But micromanaging by a cost conscious claims person, who thought the case was defensible, prevented him from developing the complete picture.

Mrs. Whitney in an appealing, elegant manner testified how close she was to her son and how thoughtful he was. Cross examination produced little for the defense. Colonel Whitney in an authoritative tone told the life story of Robert Jr., the story of a devoted, trouble free care provider, except for his recent anxiety. He spoke with pride about their ideal life together. He described his only son as gentle, quiet, and thoughtful. Just as he testified in his deposition, he explained to the jury how Robert gave up his career to care for them. The court recessed for the day, with cross examination of Colonel Whitney set for the morning. The case was progressing well for the plaintiffs.

Insurance defense work is competitive, with insurance companies trying to shrink legal fees by threatening to send their business to other firms with cheaper hourly rates. Freeman felt trapped in a procrustean bed as he struggled to satisfy insurance company demands. He returned to his office to work on the case with his paralegal assistant who computer

generated eight by ten scene photos of the family room into enlarged virtual room size depictions. A defense attorney's seasoned sixth sense urged Freeman to carefully scan the chaotic room. As they surveyed the enlargement from several angles, the legal assistant noticed in a corner an envelope with a law office return address in Riverside, California. The opened envelope was addressed to Robert Whitney, Jr., with a postmark two days before the shooting. The same sixth sense caused Freeman to look in Martindale and Hubbell for information about the attorney, Robert M. Graves, a USC Law School graduate, specializing in white collar criminal defense work, in a three person firm, in Riverside.

Freeman called attorney Graves to ask him about his involvement with the decedent. Graves had been representing Robert Whitney Jr. in a criminal matter in San Bernardino County, lost track of his client, and only located him shortly before his death. He would not discuss anything further.

Freeman googled the Press Enterprise newspaper for San Bernardino County, searched in the archives for Robert Anthony Whitney II, and found a two and a half year old story of misappropriated funds in the Auditor's Office and an ongoing investigation into widespread employee misconduct. The information was like an unexpected, plot altering *deus ex machina* in an ancient Greek play. Now Robert's reclusive lifestyle made sense, as did his parents' cautious conversations with their neighbors about Robert. Now Robert's inexplicable confrontation with the officers became clear. Most tellingly, the proper colonel and his wife likely lied in their depositions when they testified Robert took a leave from his job to care for them and when they said they knew of no past misconduct in his life. Under a seemingly impeccable veneer lay a flawed family image.

That night Daniel Freeman wrestled with how to play the new cards in his hand. The

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colonel served his country nobly for years and did not want the taint of impropriety touching the family name. He forced the issue by bringing the lawsuit that attacked the officers' judgment and integrity. Freeman also reflected on Judge Carlton's reputation as a no nonsense jurist with an ability to settle difficult cases. Pulling together the juggling ideas, Freeman determined his course of action.

Early in the morning Freeman called plaintiffs' counsel to inform him something dramatic had been discovered in the case, and he wanted to meet in chambers with Judge Carlton at 8:30 am before resuming the trial. Freeman's legal assistant called Judge Carlton's clerk to arrange the meeting. Freeman called the insurance claims person to obtain permission to use the information to try to resolve the case. The insurance company disliked protracted, costly, uncertain litigation.

The three way conference in chambers began with nervous anticipation. Freeman explained how he uncovered some potentially devastating information directly implicating the credibility of Colonel Whitney. Freeman asked plaintiffs' counsel if he could briefly discuss ex parte the issue with Judge Carlton, and then Judge Carlton would confer with plaintiff's counsel about his assessment of the new development. Plaintiff's counsel, knowing and trusting Judge Carlton, stipulated to the unusual process.

Freeman told Judge Carlton about the results of his sleuthing, how the colonel covered up his son's purported misdeeds, and provided a safe house for his miscreant son. The carefully constructed family image was about to be tarnished in a devastating cross examination that would force Colonel Whitney to admit that he lied. The Whitney name and legacy stood to be destroyed by a contrived lie in a brief moment, ruining a lifetime of remarkable achievements.

Judge Raymond Carlton, drawing on twenty-two years' experience on the bench, instinctively knew what to do. He met with plaintiffs' counsel who did not know about Robert Jr.'s past in San Bernardino. Seizing the opportunity to minimize losses for everyone, Judge Carlton offered to meet with the colonel and his wife with their attorney to explain the dire consequences of the new information and explore the possibility of their dismissing their lawsuit in return for a waiver of court costs by each side. Plaintiffs' counsel conferred with his clients for a long time and returned ashen faced. Then they all met with Judge Carlton. Carlton spent time praising Colonel Whitney for his years of distinguished service, complimented their long, devoted marriage and understood the desire to protect their son, but emphasized the crippling effect the cover up would have on their case. The lie haunted the case. Judge Carlton explained at the end of the trial he would instruct the jury with Instruction 107: "if you decide a witness has deliberately testified untruthfully about something important, you may choose not to believe anything that witness has said." He also reminded them the media would likely spread the news far and wide regardless of the outcome. The decision on how to proceed was theirs.

As their lawyer counseled them in a quiet hallway, the judge's words percolated in the recesses of Colonel Whitney's head like pulsating sounds that he could not ignore. Colonel Whitney and Audrey, crestfallen and embarrassed, understood the ramifications and agreed to dismiss the case.

Judge Carlton told Freeman to persuade the insurance company to waive court costs. Freeman made a quick call. The parties and counsel went into the court room and put the terms of the settlement on the record. Then Judge Carlton called for the jury and thanked the members for their time, only explaining the matter was resolved.

Judge Raymond Carlton hung up his robe, adjusted his bow tie, and looked on his desk at the syllabus for the Trial Practice course he taught at law school. One of the chapters began with an apt quote from Proverbs, Chapter 18, verse 17: "The man who pleads his case first seems to be in the right. Then his opponent comes and puts him to the test."

**Justice James Marchiano**

*James Marchiano is a retired Justice of the California Court of Appeal, First Appellate District. Prior to appointment to the appellate bench, he served on the Contra Costa Superior Court. Justice Marchiano was a distinguished civil trial attorney prior to appointment to the bench, and was a member of the ADC.*

# Meet the New ADC Board Members

## JEFFREY E. LEVINE

Jeffrey Levine is a partner with Matheny Sears Linkert & Jaime in Sacramento, California. Mr. Levine has represented individuals as well as international, national, regional and local companies. His practice focuses on the defense of catastrophic injury cases, wrongful death, products liability, public entity defense, and trucking and transportation.

Mr. Levine graduated from Boston University in 2001 with a Bachelor of Arts degree in Political Science. He obtained his law degree from Golden Gate University School of Law in December 2007. Jeffrey has been named a Rising Start in Northern California by *Super Lawyers* magazine.

Mr. Levine was born and raised in Massachusetts. He enjoys golfing, biking, fishing, and watching the Red Sox.

## JEFFREY V. TA

Jeff Ta is a partner at Bledsoe, Diestel, Treppa & Crane in San Francisco, California. He has a defense oriented practice and represents clients in real estate disputes, landlord/tenant, wrongful eviction, wrongful death, premises liability, employment and personal injury matters. He also has experience representing entertainers and professional athletes in trademark infringement and Right of Publicity claims. Jeff graduated from the University of California, Davis with a B.A. in Sociology in 1999. He attended the University of San Diego School of Law and obtained his J.D. in 2002.

Jeff's family immigrated to the United States in 1979 and he grew up in the Bay Area. He married his partner of 10 years, Andrew, this past July. In his spare time, he enjoys the outdoors playing on USTA Tennis leagues, kayaking and long distance running. He has been a member of the ADC since joining the Bledsoe Firm in 2008 and looks forward to serving on the Board.

## KASEY C. TOWNSEND

Kasey C. Townsend is the Partner in Charge of the San Francisco office of Murchison & Cumming, LLP. She graduated from California State University, Chico in 1986 and from University of San Diego School of Law in 1990. Her practice focuses on construction defect and injury, general liability, and employment law. She is the Chair of the Diversity Committee for Association of Defense Trial Attorneys and is also a member of DRI and CLM.

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## Meet the Board

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Kasey grew up in Southern California. She relocated to the Bay Area in 2003 from San Diego to open-up the Northern California office of Murchison & Cumming, LLP. She lives in San Jose with her husband, Mark and their two teenage sons. She enjoys running, Bikram yoga and spending time with family and friends.

**MARIE TRIMBLE HOLVICK**

Ms. Holvick is a partner in the Employment and Retail & Hospitality practice groups in the San Francisco office of Gordon & Rees Scully Mansukhani. In addition to single plaintiff and class action employment litigation, Ms. Holvick also regularly provides advice and counseling, prepares employee handbooks, and conducts harassment and management training sessions. Her employment law work has involved clients from a wide range of industries, including restaurants, wineries, hotels, health care, and universities. Ms. Holvick also regularly handles ADA Title III cases, including accessibility claims against theaters and restaurants.

Ms. Holvick has been named a Rising Star by Super Lawyers. In addition to her involvement in legal organizations, Marie is active in the Golden Gate Restaurant Association and the Center for Urban Education about Sustainable Agriculture. She earned her undergraduate and law degrees from Washington and Lee University in Virgina.

# AROUND THE ADC

## Diversity Report

The Diversity Committee thanks you for your support in 2016! The Gender and Generation Bias program was a great success and we look forward to bringing you further education and networking opportunities for 2017. The Diversity Committee continues in its work to encourage, support and further diversity and inclusiveness within our organization. Please let us know your ideas and comments which can be sent to your Diversity Committee Chair, Maria Quintero (*mquintero@hinshawlaw.com*).

*Did you know?* The current average age of an active member of the California State Bar is 49, and for an inactive member it is 62.

## New State Representative for the Defense Research Institute

Glenn M. Holley of ADCNCN has become the DRI Representative for the State of California. DRI is the national association serving civil defense attorneys. Check out the DRI website, www.dri.org, to find information, resources and discussions regarding issues that confront civil defense lawyers around the country. ADCNCN and the DRI work toward the same goal of keeping you informed and educated regarding issues pertinent to the civil defense practice, locally and nationally.

Glenn is a partner at Schuering, Zimmerman and Doyle in Sacramento, and a member of the ADCNCN Board of Directors. Glenn can help be your connection to the DRI; please feel free to contact him by e-mail at *GMH@SZS.COM,* or by telephone at (916)567-0400.

## Employment Seminar


The Employment Law Sub-Committee held another successful educational seminar on "Do the Math: Calculating Exposure and Damages in Wage and Hour Cases", at the Marine Memorial Auditorium in San Francisco. This unique seminar was well attended and our speakers, Marie Holvick Trimble, Matthew Helland, and Nicholas Briscoe did an excellent job making a difficult subject understandable and entertaining.

# Ask a Senior Partner

**David S. Rosenbaum**
McDowall Cotter

**Jill Lifter**
Ryan & Lifter

**EDITOR'S NOTE:**

**This is the second in our new feature, "Ask a Senior Partner." The purpose of this column is to provide answers to practical questions newer lawyers may be uncomfortable asking their senior partners. This month's answers are provided by David S. Rosenbaum and Jill Lifter. David is the managing partner of McDowall Cotter in San Mateo and ADCNCN Second Vice President. Jill is the managing shareholder of Ryan & Lifter in San Ramon, where she has practiced since the start of her legal career in January 1986, and she is a member of the ADCNCN Board of Directors, and co-chair of the Construction Substantive Law Section.**

**Q I keep being asked to summarize discovery responses or depositions, but no one explains exactly what they want. What is a summary?**

**A David Rosenbaum:** My first suggestion is to ask them what they want, or for an example. Summaries can consist of two things: a page and line summary or a memorandum style summary which can be used for a report. Summary means hit the peaks and skip the valleys. Assess which facts are pertinent to the legal issues and report those facts, and your suggestions for the next steps in handling the case.

**A Jill Lifter:** Many insurance carriers have guidelines for reporting which include a description of the type of information from discovery responses and deposition testimony they want, so start with any applicable client guidelines. We rarely, if ever, prepare page line summaries. Rather, focus the summary on the facts which are pertinent to the issues in the case – both disputed factual issues and applicable legal issues. Avoid merely summarizing testimony and responses without analyzing them. The summary can be divided into sections addressing liability and damages, with subsections as necessary and appropriate depending upon the size of the case and the number and complexity of the issues. Include a conclusion summarizing the impact of the responses and testimony on the case. If they suggest additional investigation that should be done – address that, too.

**Q Can I turn down assignments that I don't like?**

**A David Rosenbaum:** We do not get to choose our clients or our assignments. Turning down assignments is a good way to not receive any assignments. Take assignments that you don't like and find something in it that you will like, but most importantly work hard at it. One important part I learned from my senior partner long ago was that I am not the client – I don't own the client's worries; my job is to remain objective and to detach emotionally from the case.

**A Jill Lifter:** The short answer is "No." If you have been given an assignment, it is something that needs to be done and it has been given to you for a reason. It may be that you have a particular skill or area of knowledge and there is no time for someone else to get up to speed to get the assignment done. It may also be that, while the assignment is neither fun nor glamorous and may even be tedious, it is an essential building block for you to develop proficiency and expertise. It is important to remember in this day and age of clicking on hyperlinks for instantaneous answers and information, the practice of law requires gathering the important facts and analyzing them in the context of the applicable law. It is time consuming, but necessary. A final thought on this subject for now: If you turn down the assignment, who is going to do it? Will you essentially be delegating work to your supervising attorney and, if so, how will that be received?


***Defense Comment* wants to hear from you. Please send letters to the editor by e-mail to David A. Levy at *dlevy@smcgov.org***

**We reserve the right to edit letters chosen for publication.**

# The Lawyer's Lawyer

**William A. Muñoz**
**Murphy Pearson Bradley & Feeney**

**This is the first of a series of articles for a new feature in the ADC's *Defense Comment* entitled "The Lawyer's Lawyer," where the author will address ethical issues and ways to avoid malpractice in your daily practice. The attorney's first concern is whether to accept a potential new client and the signs to look for in making that decision.**

## To Accept or Not to Accept the New Client

The President/CEO of a small business widget maker contacts you needing an attorney to defend the business in a litigation matter where the plaintiff is asserting that your prospective client breached its contract to provide widgets. The plaintiff is claiming several hundreds of thousands of dollars as compensatory and consequential damages, such as lost profits, attorney's fees and litigation costs. Plaintiff has retained a big-time plaintiff's attorney known for substantial jury verdicts to represent it in the business litigation case. The prospective client did not maintain any type of insurance that could potentially cover the claims asserted in the lawsuit and must defend the case on its own dime.

First and foremost, run a conflict check before meeting with the client and obtaining any substantive information about the potential case, because disclosure of confidential information during an initial consultation can create an attorney-client relationship even if you decide not to take the case (*See People ex. Re. Department of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1148; *see also Beery v. State Bar* (1987) 43 Cal.3d 802, 811-812.) The last thing an attorney wants to do is to meet with a potential client about litigation and find out that the prospective matter is against an existing client. In that situation, you obviously cannot take on the case. (*See, e.g., Flatt v. Superior Court* (1999) 9 Cal.4th 275, 290.).

Assuming the initial, conflict check is clear, you should set up a face-to-face meeting to discuss the case. A face-to-face meeting is very important so you can see who it is that you may be working with and how well you interact with one another. You may be working with this individual for the next two to three years in litigation and you need to ensure that it will be a good fit. By meeting with the client you show him or her that you will take the case seriously, literally being present. Discuss whether to meet the client in your office or at the place of business.

During the initial interview, the prospective client states that the business is on a shoestring budget and cannot spend a bunch of money litigating this lawsuit. At the same time, the prospective client thinks the claim is without merit and wants to vigorously defend it. He has been to four other attorneys, all of whom have declined the representation, but he did not indicate why. Should you take this client on?

### IS THIS A RED FLAG?

On one hand, your gut is telling you, "don't do it." On the other hand, your brain is telling you that you are a sole practitioner/small firm and need the revenue that this case may be able to generate. Which should you believe? In this instance, your gut is the way to go as there are telltale signs of a potential problem down the road. And for an attorney, that potential problem is a malpractice claim that will likely be far more expensive than any fees generated from the case itself.

First, the prospective client is claiming that the lawsuit is without merit, but wants a vigorous defense on a shoestring budget. This should raise some serious concern for the attorney because litigation is expensive. Once you start discovery, the costs can skyrocket geometrically. And, if you have to go to trial, the costs will be substantial. This poses a significant problem for a prospective client on a shoestring budget. This should be conveyed to the prospective client because his expectations cannot realistically be accomplished. If the prospective client nonetheless wants to proceed, the attorney should not take

*Continued on page 28*

the case because the prospective client is entertaining unrealistic expectations that will only create problems down the road when it cannot pay the fees incurred in providing the aggressive defense desired.

Second, the prospective client hems and haws about the proposed retainer that you would require to defend small business in the case based upon your experience in handling similar cases. You are asking for an initial $10,000 retainer with an evergreen provision that requires the potential client to replenish the retainer as it is used up. If the prospective client objects to an initial retainer and/or cannot afford it, then how is it that the client is going to afford the fees incurred after the retainer is exhausted? The likelihood that the potential client will be able to replenish the retainer is minimal. Taking this prospective client is a quick way to set up the attorney for a large outstanding account receivable that will either never be paid or result in a fee dispute down the road. The latter is a quick route to an unwanted complaint for legal malpractice. If the potential client seeking representation in an actively litigated matter cannot afford the initial retainer, then you as the attorney should not take on the representation.

Along the same lines, with the evolving use of credit cards to pay attorney fees, if the prospective client offers to pay the initial retainer with a credit card, provide in the legal services agreement a provision that allows you as the attorney the ability to charge the credit card for any outstanding balances more than 30 days old. (Cal. State Bar Form. Open 2007-172 – permitting use of credit cards to pay attorney's fee provided compliance with the State Bar Act and Rules of Professional Conduct.) If the credit card is declined, this is another sign that this is probably not the right client for you.

Third, the prospective client has been to four other attorneys, all of whom have declined to represent him. Why? Was it because they, too, have told him that his goals and/or expectations regarding the anticipated defense to the lawsuit cannot be accomplished? Was it because the potential client did not get along with these other attorneys? If you are contemplating this representation, then you should delve into these issues and discuss them with the prospective client to see what information you can flesh out as to why these other attorneys were not retained. Similarly, ask the prospective client if he or the business has been involved in other litigation and the outcome regarding the same. If so, why did they not go back to the attorney who previously represented the business? Consider contacting the prospective client's former counsel to see what occurred in the other case and more important, how this business was as a client. Of course, seek permission from the prospective client to allow the prior counsel to speak to you in order to avoid any issue of attorney-client privilege. If the prospective client does not want you talking to its former counsel, this should be another red flag. Regardless, if the hair on the back of your neck rises as you are discussing this with the prospective client or after speaking to former counsel, it is a clear sign that you should not take the case.

Finally, economic issues aside, if the prospective client does not appear to be forthcoming with you regarding information concerning the subject litigation, wants to limit your access to documents or witnesses, or otherwise wants to determine what is or is not relevant, these are signs that this is a relationship that the attorney does not want to get involved in.

Put it in writing: agreement to either represent or to decline representation

We all know that an attorney needs a written agreement to represent a client. But, once you recognized the red flags and determined that this is not the client for you, then you should memorialize this determination in writing to the prospective client. Send a declination letter to the prospective client stating that your firm is not accepting the case and that the firm does not represent the prospective client so that there is no misunderstanding going forward that there is no attorney-client relationship. (*See Bennington v. Superior Court* (2006) 136 Cal.App.4th 61, 72: a person cannot reasonably believe an attorney-client relationship exists after the attorney has clearly refused employment.)

Solo practitioners or small firms looking to generate business have to be careful not to let monetary gain override their common sense and judgment in determining which client/cases to accept and be careful not to ignore clear red flags of a potential problem client. Recognizing the red flags in an initial interview and following your instincts are critical to avoiding a long-term problem in the existing litigation and a subsequent malpractice action. Do not let the prospective client's problem become your problem. If your instincts tell you to decline the representation, follow them.

**William A. Muñoz**

*Bill Muñoz is a shareholder at Murphy Pearson Bradley & Feeney in Sacramento, where he specializes in legal malpractice and other business matters. His undergraduate degree is from University of California at Davis, and his law degree is from Hamline University School of Law. Bill is a member of the ADCNCN Board of Directors.*

A·D·C
VERITAS

## DO YOU AGREE OR DISAGREE?

**... with the author of an article that you've read in *Comment*?**

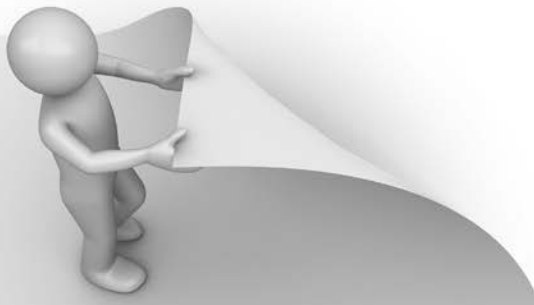
**Do you have a brilliant practice pointer for fellow defense counsel?**

**Is there a subject that you would like to see addressed in a continuing legal education seminar?**

**Is there something legislators in Sacramento can do to make your professional life easier?**

**Send a Letter to the Editor. See page 1 for editorial information.**

# ADC Amicus Corner



**By Don Willenburg**
**Gordon & Rees LLP**

The ADC's amicus briefs committee exists to bolster and provide institutional support for the defense position at courts of appeal and the California Supreme Court. The committee also provides excellent opportunities for members (this means you or the smart colleagues at your office) to write briefs, letter briefs supporting review, and letters supporting publication or depublication on cases involving important defense issues.

Since the last issue, the amicus committee has pursued, among others, the following activities on behalf of the defense community:

**1** ***Moore v. Mercer*** **(2016) 4 Cal. App.4th 424 – does *Howell* apply when uninsured plaintiff uses "medical finance" company?**

We jointly with the ASCDC requested depublication of this troubling decision. *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541 requires that medical special damages be limited to reasonable value actually paid (or to be paid). *Moore* undercut *Howell*. The Court of Appeal upheld a judgment where (a) the trial court refused to allow any evidence as to the amount paid by the medical finance company that purchased the lien, or why the doctors and the company agreed upon the particular numbers; (b) there was no evidence as to what insurers or Medi-Cal would pay in arm's length transactions for the same medical services; and (c) although several doctors and a nurse billing expert claimed their billing amounts reflected customary "charges" and were "reasonable," no evidence specifically tied that testimony to actual payments in the marketplace. The opinion never attempts to reconcile this result with *Howell*'s "market value" definition of reasonableness.

The Third District, which has announced other decisions apparently inconsistent with *Howell*, declined to order the case un-published.

**2** ***Sanchez v. Kern Emergency Medical Transportation Corporation*** **(No. F069843, Jan. 13, 2017) – affirming the right to summary judgment where plaintiff expert testimony is defective.**

With the ASCDC, we filed a joint request to publish this decision. It involved emergency medical response and conclusory plaintiff expert declaration that the response was too slow. The decision affirmed the exclusion of expert testimony that rests on assumptions contrary to the undisputed facts and fails to refute the opposing party's expert opinions. Further explains that an expert opposing a summary judgment motion may not simply ignore medical literature presented by the other party's experts that calls into question the expert's assumptions. The court also emphasized an expert's opinion may not contradict the undisputed facts of the case, and that causation requires "a reasoned explanation."

## WHAT CAN, AND DOES, THE ADC'S AMICUS BRIEFS COMMITTEE DO FOR YOU?

The ADC's amicus committee can help support you and your clients in a case of general defense interest in all the following ways:

1. Requests for publication or depublication of court of appeal decisions.

2. Amicus brief on the merits at the court of appeal.

3. An amicus letter supporting a petition for California Supreme Court review.

4. Amicus brief on the merits at the Supreme Court.

5. Share oral argument time, with court approval.

6. Help moot court advocates in advance of oral argument.

In many cases, the ADC works jointly with our Southern California colleagues, the Association of Southern California Defense Counsel. That does not always happen, but getting the chance to bat around these issues with lawyers from across the state is another great benefit of being on or working with the amicus committee.

If you are involved in a case that has implications for other defense practitioners, or otherwise become aware of such a case, or if you would like to get involved on the amicus committee, contact any or all of your amicus committee: Don Willenburg at *dwillenburg@gordonrees.com;* Patrick Deedon at *pdeedon@maire-law.com;* Jill Lifter at *jlifter@rallaw.com;* Sam Jubelirer at *samuel.jubelirer@dentons.com.*

**Don Willenburg**

*Don Willenburg is a partner at Gordon & Rees, Oakland/San Francisco, where he chairs the firm's Appellate Department. He is Chair of the ADCNCN Amicus Committee, and also serves as a Representative of the State Bar on the Information Technology Advisory Committee to the Judicial Council of California.*

# SUBSTANTIVE LAW SECTION REPORTS

**Are you interested in writing an article? Joining one or more substantive law committees? Do you have a suggestion for a topic for a seminar? We are always looking for ways to involve our ADC Members, and encourage you to be active in as many substantive law committees as you are interested. Please contact the section chairs (see roster of section and contact information for co-chairs in box below) and let them know how you would like to participate.**

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## BUSINESS LITIGATION

**Holiday D. Powell | *Co-chair***
**Michon Spinelli | *Co-chair***

Welcome to a New Year in Business Litigation! We'd like to update you on some Legislation that might be affecting your business clients in the coming year.

**Minimum Wage:** California's minimum wage increased to $10.50 an hour on January 1, 2017 for all businesses with 26 or more employees. Several individual cities also increased wages: San Diego raised the minimum wage to $11.50 an hour for all businesses regardless of the number of employees (tips/gratuities do not count toward the minimum wage). Los Angeles increases the minimum wage to $12.00 an hour for businesses with 26 or more employees starting July 1, 2017. Make sure your clients know the rules for all Cities and effective start dates, as waiting time penalties can be imposed if employees are not paid correctly when wages are due.

**Fair Pay:** California's Fair Pay Act via SB 1063 extends prior amendments to the Fair Pay Act to workers of a different "race or ethnicity" in addition to gender. Workers in substantially similar jobs must be paid equal wages regardless of gender, race or ethnicity. Also, an employer cannot rely solely on the employee's past salary history to justify a difference in salary. The applicable Labor Code section was amended to state that "prior salary, shall not by itself, justify any disparity in compensation." While employers may still inquire about salary history, the law

*Continued on page 31*

seeks to eliminate any penalty due to prior practices affected by gender bias.

**Class Actions:** The Ninth Circuit joined with the Sixth, Seventh and Eighth Circuits to hold that Federal Rule of Civil Procedure 23 does not require class action plaintiffs to demonstrate an "administratively feasible" way to identify class members as a prerequisite to class certification.

**Choice of Law and Venue In Employment Contracts:** Labor Code section 925 prohibits employers from requiring employees who primarily reside and work in California to agree to, as a condition of employment, arbitrations outside of California or pursuant to another state's laws. Any such provision is voidable by the employee.

**The Bathroom Law Fallout:** Government Code §11139.8 imposes travel restrictions for employees of California state agencies to any state which the California Attorney General identifies as having enacted legislation which discriminates against persons on the basis of sexual orientation, gender identity or gender expression. California will not fund or sponsor travel to those states (for conferences, *etc.*) unless there is a prior contractual obligation. The law currently applies to travel to North Carolina, but as interpreted may expand to include up to 19 other states and increase if other states pass new laws. Sports teams in the University of California and California State systems are also included.

**Gender-Neutral Restrooms:** AB 1732 requires all employers to post signs on single-user restrooms indicating that the restroom is an "all-gender" facility by March 1, 2017. The law will not affect restrooms with multiple stalls.

**Privacy:** California now requires notification for a breach of encrypted personal information where the encryption key or security credential that could render the encrypted personal information readable or useable is reasonably believed to have been acquired by an unauthorized person. Previously notification was only required for an unencrypted data breach.

**On-Call Rest Periods:** On December 22, 2016, the California Supreme Court issued its opinion in *Augustus v. ABM Security Services Inc.,* holding that California state law prohibits on-duty and on-call rest periods. During required rest breaks, employers must relieve their employees of all duties and relinquish any control over how employees spend their break time.

## CONSTRUCTION

**Jill J. Lifter | *Co-chair***
**Jennifer L. Wilhelmi | *Co-chair***

We are excited about 2017 and the possibilities it holds. We expect the Supreme Court to schedule oral argument and issue its opinion in *McMillin Albany LLC v. The Superior Court of Kern County* (2015) 239 Cal. App.4th 1132 (review granted), in which the ADC submitted an *amicus* brief last year. The opinion should decide the issue of whether Title 7 of the Civil Code, also known as SB 800 or The Right to Repair Act, provides the exclusive remedy for residential construction defect claims, regardless of whether the alleged violation has caused physical damage. Expect a Newsflash when the decision is published.

A recent opinion addressing a coverage issue may also have implications for express contractual indemnity claims. In *Navigators Specialty Insurance Co. v. Moorefield Construction, Inc.* (2016) 6 Cal. App.5th 1258, the court held that harm foreseeably resulting from a construction defect is not a covered "occurrence," defined as an "accident," in a general contractor's general liability policy if the harm was caused by the contractor's intentional act, even if the contractor did not intend the harm to result. Moorefield was a general contractor that entered into a contract to build a Best Buy store in Visalia for the shopping center's developer, DBO. Construction included a 4 inch thick, 30,000 square foot slab on grade. Two separate moisture vapor emission tests of the slab taken by Moorefield's consultant indicated the rates of moisture vapor emission was higher than permitted by the project specifications. The consultant advised that another four to eight months of drying time before flooring materials were installed was needed for the concrete to cure sufficiently to meet project specifications. Moorefield did not wait, but instead, directed its flooring subcontractor, Solo Flooring, to install the flooring before the moisture emission rates could meet specifications, but only after Solo demanded and received a letter from Moorefield waiving any claims against Solo for any "moisture related problems." The flooring failed as a result of excessive vapor emissions from the slab.

The Court of Appeal held that Navigators had no duty to indemnify Moorefield because the flooring failure was not an "occurrence," defined in the policy as an "accident." The court concluded that because Moorefield performed a deliberate act, there was no accident unless some additional, unexpected, independent, and unforeseen happening occurred that produced the damage. There was no such event here. Moorefield's decision to have the flooring installed immediately was based on cost, and it took the risk that the flooring would not fail. If Moorefield believed that the flooring would not fail, it did so mistakenly. But "[a]n insured's mistake of fact or law does not transform an intentional act into an accident." (Quoting *Fire Insurance Exchange*, 181 Cal.App.4th at 393.) The court of appeal thus affirmed the trial court's finding that Navigators had no duty to indemnify Moorefield. The question in the indemnity context under contracts entered into when an indemnitee could be indemnified for its own negligence, but not for its sole negligence or willful misconduct, is whether the intentional act is the same thing as willful misconduct. Food for thought.

Our annual construction seminar is just around the corner! Mark your calendar and plan to join us on April 28, 2017. This year, we will focus on more traditional construction law issues which our clients face outside of construction defect litigation, such as bonds, liens, surety claims, and dealing with the CSLB. Learning about these issues and becoming proficient in this area of the

*Continued on page 32*

law can help you expand your practice beyond insurance defense and make you a valuable resource for your clients. Even if your practice is confined to construction defect litigation, you will benefit from this seminar because many construction defect claims are reactive cross-complaints in traditional construction claim actions and understanding the underlying claims is essential to evaluating the case.

## EMPLOYMENT LAW

**Nolan Armstrong | *Co-chair***
**Marie Trimble Holvick | *Co-chair***

The Employment Section hosted a successful wage and hour damages seminar in San Francisco in January (see page25.) We invite section members to propose ideas for future seminars and presentations. With the new administration, the Employment Section anticipates changes to policies and legislation on the Affordable Care Act, immigration compliance and B-1 visas, and class action waivers in arbitration agreements. Look for newsflash updates as further developments unfold.

## INSURANCE

**Glenn M. Holley | *Co-chair***

Welcome to the New Year! Your Insurance Committee is continuing to work this year to stay abreast of issues that are significant and influential to your practice. Our goal is to keep you informed of the latest trends, statutes and case law regarding the many facets of the topic of insurance. See below!

As a committee, we are considering topics for an insurance seminar at the Annual Meeting in December. If you have ideas of "Hot Topics," please let us know ... we want to meet your needs! In our organization, we have excellent defense lawyers in every field, including you! We look forward to working with you this coming year.

### Incremental Chemical Change in Property May be Property Damage Triggering a Duty to Defend

Dean A. Pappas, of Ropers Majeski Kohn & Bentley, Redwood City, reports that in *Tidwell Enterprises, Inc. v. Financial Pacific Ins. Co., Inc.,* 6 Cal. App. 5th 100 (2016), the Court of Appeal concluded that a chemical change in tangible property (wood framing) due to exposure to continuous or repeated exposure to the same general condition (heat within a chimney chase) was potentially "property damage" caused by an "occurrence."

Tidwell Enterprises, Inc. participated in the construction of a house by installing a fireplace in 2006 or 2007. Its contract included the fabrication and installation of a custom "termination top" for the fireplace. In November 2011, the house was damaged by fire believe to have been caused by the manufacture or installation of the fireplace, chimney chase, or component parts. State Farm indemnified the owner of the home for losses caused by the fire and filed an action, as subrogee, against Tidwell. Tidwell tendered defense of the action to Financial Pacific Insurance Company.

Financial Pacific provided general liability coverage to Tidwell between March 2003 and March 2010. The policies all included standard definitions of "property damage" and "occurrence." It denied the tender of defense explaining that the property damage did not occur during a Financial Pacific policy period. Extraneous evidence was provided to Financial Pacific indicating the defect in the fabrication and installation of the "termination top" may have resulted in the repeated exposure of the chimney chase framing to excessive heat from fires burned in the fireplace. This heat could incrementally cause changes to the wood framing lowering the ignition temperatures of the wood to in some cases below 250 degrees. Successive fires in the fireplace by the homeowner, including fires while Tidwell was insured by Financial Pacific may each have caused damage to the chimney system and lowered the point of combustion which eventually resulted in the main fire damage to the home.

Tidwell sued Financial Pacific seeking, in part, a determination of the duty to defend. The trial court granted a motion for summary judgment by Financial Pacific concluding since the last Financial Pacific policy period ended on March 1, 2010, there was no potential for coverage since State Farm sought recovery for the fire which occurred on November 11, 2011. The Court of Appeal disagreed concluding, in part, that Financial Pacific failed to eliminate all possibility that the repeated exposure of wood to excessive temperatures chemically altered the wood in such a way that the wood could be deemed physically injured (i.e., damaged) by that exposure while a Financial Pacific policy was in effect.

In reaching its conclusion, the appellate court was not persuaded by out-of-state decisions that rejected the theory regarding incremental damage to property caused by continuous or repeated heat exposure prior to a manifestation of damage to the property by fire. The Court also concluded that consideration of that theory did not amount to speculation about unpled claims of a manufacturer's duty to defend. (See generally *Hurley Construction Co. v. State Farm Fire & Casualty Co.* (1992) 10 Cal.App.4th 533; *Gunderson v. Fire Ins. Exchange* (1995) 37 Cal.App.4th 1106.) Tidwell was found to have offered a viable theory as to how the fire that damaged the house that might have been the result of physical injury to tangible property that occurred during one or more of Financial Pacific's policy periods and that resulted from an occurrence. This triggered a duty to defend.

## LANDOWNER LIABILITY

**Jeffrey Ta | *Chair***

### California Expands Liability in "Take Home" Toxic Exposure Cases

In *Kesner v. Superior Court* (2016) 1 Cal.5th 1132 (consolidated with *Haver v. BNSF Railway Co.*), the Supreme Court addressed the issue of whether employers or landowners owed a duty of care to prevent secondary exposure to asbestos.

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Plaintiffs alleged that take home exposure to asbestos was a contributing cause to the deaths of Lynne Haver and Johnny Kesner, and the employers of Lynne's former husband and Johnny's uncle had a duty to prevent this exposure. Defendants argued that users of asbestos have no duty, either as employers or as premises owners, to prevent non-employees who have never visited their facilities from being exposed to asbestos used in defendants' business enterprises.

The Court stated:

> We hold that the duty of employers and premises owners to exercise ordinary care in their use of asbestos includes preventing exposure to asbestos carried by the bodies and clothing of on-site workers were it is reasonably foreseeable that workers, their clothing, or personal effects will act as vectors carrying asbestos from the premises to household members, employers have a duty to take reasonable care to prevent this means of transmission. This duty also applies to premises owners who use asbestos on their property, subject to any exceptions and affirmative defenses generally applicable to premises owners, such as the rules of contractor liability.

*Id.* at 1140. The Court limited its holding solely to members of a worker's household, *i.e.* persons who live with the worker and are thus foreseeably in close and sustained contact with the worker over a significant amount of time. Prior to the *Kesner* holding, property owners did not have a duty to protect family members of workers on its premises from secondary exposure to asbestos used during the course of the property owner's business. (*Campbell v. Ford Motor Co.* (2012) 206 Cal.App. 4th 15, 34.) In disapproving *Campbell*, the Court held the foreseeability factors weighed in favor of finding duty to members of employees' households and policy considerations weighed in favor of finding that employers have a duty to members of employees' households to prevent exposure to asbestos fibers which employees carried home on their person and/or clothing.

## LITIGATION

**Patrick L. Deedon | *Co-chair***
**Mike Pintar | *Co-chair***
**Kasey Townsend | *Co-chair***

Welcome to the new year and new statutes the passed by the Legislature. While many new laws were passed, did you happen to note that the procedure for expert discovery has been modified effective January 1, 2017? Code of Civil Procedure § 2034.415 has been added to the discovery statutes which requires experts to produce requested materials three business days prior to their deposition. The new section states, "An expert described in subdivision (b) of Section 2034.210 whose deposition is noticed pursuant to Section 2025.220 shall, no later than three business days before his or her deposition, produce any materials or category of materials, including any electronically stored information, called for by the deposition notice." The Litigation Committee is interested in your experience in implementing and complying with this new code section. Hopefully, this new statute will streamline expert depositions in effective preparation and efficiency in taking the deposition.

Do any of the Counties you practice in have "Local Local rules"? ADCNCN's Litigation section is the perfect forum to exchange these rules with fellow members. For instance, in Shasta County, the court accepts and routinely processes stipulations to continue trial; however, the stipulation *must* have a few (three preferred) proposed dates for commencement of a new trial date. If the stipulation does not have the proposed dates, it gets returned and you are starting back at square one. Please let us know your Counties' procedures.

## MEDICAL MALPRACTICE AND HEALTHCARE

**D. Marc Lyde | *Co-chair***
**Erin S. McGahey | *Co-chair***

Our Section's seminar on *Defending Health Care Professionals Before the Medical Board of California* was well-attended at the Annual Meeting. Both attendees and panelists enjoyed a lively discussion during the question and answer period after the presentation.

In the break-out sub-law session afterwards, a number of excellent topics for 2017 seminars were suggested by the ADCNC members. These included the following:

- Defending a medical professional liability action from the viewpoint of the defendant physician and expert consultant;
- The use of technology at trial;
- Electronic medical records – use in discovery and at trial.

One of these topics will be the subject of a seminar at the 2017 ADCNC Annual Meeting.

In recent appellate developments, the Court in *Nava* v. *Saddleback Memorial Medical Center*, 2016 DJAR 10371, considered the statute of limitations for medical professional liability actions under C.C.P. section 340.5, in the context of a gurney misadventure. The plaintiff sustained orthopedic injuries when a gurney tipped over during a transfer between medical facilities. The complaint was filed more than a year after the incident. Summary judgment was granted for the defendant hospital on the basis that the action was time-barred under Section 340.5.

Citing *Flores* v. *Presbyterian Intercommunity Hospital*, 63 Cal. 4th 75 (2016), (hospital bed rail failure) the appellate court affirmed the granting of summary judgment by the trial court, holding that, because the transfer was undertaken pursuant to a physician's orders and was an integral part of the patient's treatment,

*Continued on page 34*

the action was one for medical professional liability, subject to the one year limitation of Section 340.5, rather than the 2-year statute of limitations for general personal injury cases (CCP section 335.1.)

In the very recent decision of *Bigler-Engler* v. *Breg, Inc., et al.*, 2017 DJAR 111, the Court considered, among other issues, the intersection of Proposition 51 and the $250,000 general damages cap of MICRA (Civ. Code section 3333.2). Citing *Rashidi* v. *Moser*, 60 Cal. 4th 718 (2014), the Court held that, in the case of a single co-defendant subject to MICRA, Prop. 51 would first be applied to that defendant's share of non-economic damages. If that amount were above the MICRA limitation, then MICRA would be applied to reduce the amount to $250,000. In *Bigler-Engler*, the medical defendant's liability pursuant to Prop. 51 was reduced to $130,000. Hence, the Court reasoned that the $250,000 limitation would not apply.

The Medical Malpractice Sub-Law Section welcomes all input from ADCNC members regarding their interest in the above topics, as well as other topics of current interest in medical malpractice and health care law.

## PUBLIC ENTITY

**James J. Arendt | *Co-chair***
**Jeffrey E. Levine | *Co-chair***

On January 13, 2017, the Ninth Circuit Court of Appeals reversed a District Court's denial of summary judgment on qualified immunity grounds in a 42 U.S.C. § 1983 action alleging excessive force and an unlawful search against King County, Washington sheriff's deputies. The opinion is significant in that it provides guidance on the issue of the community caretaking function of law enforcement and the impact on Fourth Amendment claims of false arrest and unlawful search.

Tonja Ames called 911 to request an ambulance for her 22-year-old son, Colin Briganti. When Ames returned home from work she found Briganti slumped over and incoherent. Ames also found a suicide note and told 911 he may have overdosed on one of his medications. Briganti suffered from medical issues as a result of prior drug abuse.

The 911 operator classified the call as a high priority suicide attempt and dispatched emergency services personnel and law enforcement. King County Deputy Sheriff Heather Volpe responded and pulled up to the house at the same time as the rescue personnel. Ames met Deputy Volpe and the EMT's in her driveway and told them about Briganti's medical history, his current condition and the suicide note. Ames directed them to an entrance to the garage apartment where Briganti lived.

As Ames and the two EMT's arrived at the doorway, Ames refused entry to Deputy Volpe telling her that only the EMT's could enter. Deputy Volpe told Ames that if she could not enter with the EMT's for their safety, they were not going to be allowed to assist Briganti. The EMT's, who had seen Briganti sitting in a chair semi-conscious and lethargic, exited the apartment.

Deputy Volpe and the EMT's retreated to their vehicles. Deputy Volpe radioed dispatch and her supervisor to notify them of what had occurred. Deputy Volpe also requested backup. As a drug recognition expert, Deputy Volpe was concerned that Briganti might die in light of the symptoms he was exhibiting and his current medications.

After Deputy Volpe and the EMT's withdrew from the apartment, Ames panicked and enlisted neighbors to help her carry Briganti outside to load him into her pickup truck so she could drive him to the hospital. Deputy Volpe assumed Ames was going to allow the EMT's to work on Briganti, however, when sthe Deputy realized that the mother was going to put him in the truck she moved her patrol car to prevent them from leaving. Deputy Volpe approached Ames and saw Briganti buckled into the passenger seat slumped over and unresponsive.

Deputy Volpe told Ames she needed to let the EMT's take Briganti and that it was unlawful for Ames to leave with him. Ames angrily responded that since the EMT's refused to treat him she was going to leave. Ames climbed into the driver's seat and put Briganti's suicide note between the truck seats. When Ames tried to put the keys in the ignition, Deputy Volpe prevented Ames from closing the door and grabbed her by the the standard case law concerning whether a use of force is objectively reasonable or not – *Graham v. Connor*, 490 U.S. 386, 397 (1989), et seq.

The court decided it was objectively reasonable for Deputy Volpe to execute three head slams and use her knee to pin Ames to the ground in an effort to prevent Ames from obstructing efforts to save Briganti.

The first *Graham* factor considers the severity of the crime at issue. Here, Deputy Volpe was acting in her community caretaking capacity, not in the detection, investigation or acquisition of evidence relating to criminal charges. The government interest in Deputy Volpe's subduing of Ames was substantial. By her disregard of Deputy Volpe's lawful commands, Ames was prolonging a dire medical emergency - in fact a life-threatening situation.

The second *Graham* factor analyzes whether Ames presented an immediate danger to Deputy Volpe or others. Deputy Volpe was concerned for Briganti's immediate survival in that he appeared unconscious while being loaded into Ames's truck. In preventing Ames from leaving with Briganti so the EMT's could begin treating him, Deputy Volpe faced a rapidly escalating situation. Ames, who admittedly was angry, panicked in trying to leave. A reasonable officer on the scene could conclude, as Deputy Volpe did, that Ames presented an immediate danger.

Undisputed evidence established that Ames was interfering with Briganti's medical treatment, physically resisting arrest, and attempting to evade Deputy Volpe by flight. On balance, Briganti's need for life-saving emergency medical care and the need to protect the EMT's and other motorists from potential harm outweighed any intrusion on Ames's Fourth Amendment rights. Deputy Volpe's use of force was reasonable in response

*Continued on page 35*

to the totality of circumstances and she had to make split-second decisions during rapidly evolving circumstances. Even if Deputy Volpe were mistaken in the judgments she made, as a matter of law her actions did not rise to the level of plain incompetence.

The deputies were also entitled to qualified immunity from the unlawful search claim under the "emergency doctrine." Officers acting in their community caretaking capacities and responding to a perceived emergency may conduct certain searches without a warrant or probable cause. In determining whether the emergency exception applies, the court considers whether under the totality of circumstances, law enforcement had an objectively reasonable basis for concluding there was an immediate need to protect others or themselves from serious harm, and whether the scope and manner of the search was reasonable to meet that need. Here the court found that the deputies' search of the truck fell within the emergency exception.

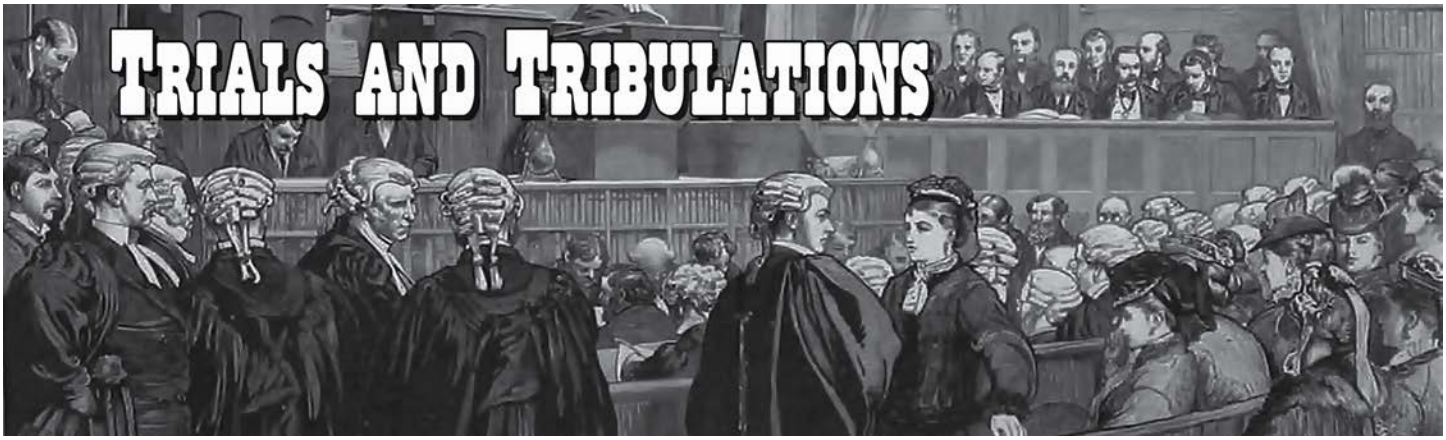
## TOXIC TORTS

**Erin S. McGahey | *Co-chair***
**Tina Yim | *Co-chair***

The last year has presented several interesting developments in tort liability. One case that resonates throughout the defense bar is the California Supreme Court's decision in *Kesner v. Superior Court* (2016), 1 Cal.5th 1132. Two companion cases, *Kesner v. Pneumo Abex, LLC* (First Appellate District) and *Haver v. BNSF Railway Co.* (Second Appellate District), were under review by the California Supreme Court for more than two years before the decision was issued on December 1, 2016. The Court ruled that employers and premises owners owe a duty to exercise ordinary care in their use of asbestos to prevent take-home exposure to members of the worker's household, i.e., persons who live with the worker and "are foreseeably in close and sustained contact with the worker over a significant period of time." The Court set forth a detailed analysis of the several factors set forth in *Rowland v. Christian* (1968) 69 Cal.2d 108, and came to the opposite conclusion reached by the Second District Court of Appeal's decision in *Campbell v. Ford* (2012) 206 Cal.App.4th 15. There is no longer a categorical exemption from liability for take-home exposure for employers or premise owners. The scope of this ruling remains to be interpreted with respect to other trades or contractors working in the vicinity of the primary exposed worker.

Johnson & Johnson took some hard hits in 2016 for their talcum powder products, Baby Powder and Shower-to-Shower, alleged to have contributed to the development of women's ovarian cancer. A majority of the cases against Johnson & Johnson have been in the Missouri Circuit Court in St. Louis where three large verdicts were rendered against Johnson & Johnson with punitive damages amounting to $72 million, $70 million and $55 million. Additional cases are pending in the federal multidistrict litigation in New Jersey as well as the multicounty litigation in New Jersey's Atlantic County Superior Court. The talc litigation against Johnson & Johnson has made its way to California, with the first trial scheduled in California to commence July 3, 2017 in Los Angeles Superior Court.

The Toxic Tort Sub Law Committee will be presenting its seminar for two evenings in May 2017 in San Francisco. Ideas or suggestions for seminar events of publications are always welcome. The Toxic Tort Sub Law Meetings are held approximately once a month and if you wish to be included on the E-mail notifications, please contact Erin McGahey at Sinunu Bruni LLP, (415) 362-9700 (*emcgahey@sinunubruni.com*), or Tina Yim at Imai Tadlock Kenney & Cordery, LLP (415) 675-7000 (*tyim@itkc.com*).




**We recognize and salute the efforts of our members in the arena of litigation – win, lose or draw.**

Compiled by
**Ellen C. Arabian-Lee**
**Arabian-Lee Law Corporation**
**Editor, *Defense Comment***

**Mark B. Canepa** of White | Canepa LLP in Fresno, obtained a defense verdict for a physician in a medical negligence action in Fresno County Superior Court. The case arose out of two knee replacement surgeries performed in 2012 and 2013, respectively.

Plaintiff was a then-58-year-old smog and automotive technician who had a knee replacement on August 29, 2012. The procedure was without any apparent complications. Several months later, in the spring of 2013, Plaintiff was still doing fairly well, although he did have some residual complaints. However, by the mid-summer of 2013, it was apparent that the femoral component from the knee replacement had loosened. A revision surgery was therefore performed, in mid-September 2013. At that time, the femoral component only was replaced by the doctor. That surgery was also without any apparent complication. Plaintiff subsequently alleged that the revision surgery was necessitated by the Defendant's failure to properly cement the femoral component at the time of the original surgery in 2012. Plaintiff also alleged a delay in diagnosis; that the loosening of the component should have been diagnosed in March of 2013 instead of July of 2013.

Plaintiff retained both an orthopedic expert to testify on the standard of care and a life care planner to testify on the alleged future care needs of the patient who was no longer able to perform his job. Prior to trial, Plaintiff made a CCP 998 offer for $299,999. At trial, Plaintiff asked for $2.2 million, of which $1.2 million was for the life care plan and the bulk of the remainder was for pain and suffering in the future. Defendant's pre-trial offer was a CCP 998 for a dismissal in exchange for a waiver of costs. The jury deliberated approximately 30 minutes after a seven-day trial and returned a verdict of no negligence.

**James J. Arendt** of Weakley & Arendt, LLP, in Fresno, recently prevailed on a summary judgment motion filed in the U.S.D.C. Eastern District, in Fresno. District Judge David C. Bury heard the motion. The Plaintiff appealed the District Court's granting of summary judgment to the Ninth Circuit. The Ninth Circuit affirmed the granting of summary judgment.

The Plaintiff was a civil detainee pursuant to California's Sexually Violent Predator laws. He was transported from Atascadero State Hospital to the Fresno County Jail. The plaintiff alleged that while in the jail, he was isolated for punitive purposes and later improperly housed with criminal defendants, all pursuant to policies put in place by the defendant assistant sheriff.

Undisputed material facts and California law established that the assistant sheriff did not have final policy making authority in the jail, nor was she directly involved in the incarceration of the Plaintiff. There were no other grounds with which the Plaintiff could establish supervisory liability and summary judgment was granted in favor of the defendant assistant sheriff.

**Greg Thomas** of Boornazian, Jensen & Garthe received a defense verdict for his client following a six-week trial in Sonoma County, in a case involving claims against three different defendants for negligence, conversion, fraud, legal malpractice and property damage. The Hon. Gar Nadler presided. Plaintiffs were represented by the law offices of David McKim. Other defense firms include the Roberts Law Firm and Murphy, Pearson, Bradley and Feeney.

**Art Casey** and **Colin McCarthy** of Robinson and Wood, Inc., in San Jose, defensed a case based on assumption of the risk in Fresno County Superior Court, Hon. Kristi Culver Kaptean presiding. They represented a client ("Ryan") who was 16 years old at the time of the accident, who was sued by 54-year-old Chuck Heflebower after Heflebower suffered a Laforte III facial fracture when a metal bat slipped out of Ryan's hands while he was playing "home run derby" in a backyard with Heflebower's sons. Heflebower claimed he did not know the boys were playing a game with a metal bat right before the bat hit him. in the face. Ryan testified that Heflebower was standing very near him talking about who was better, the Giants or Dodgers, when Ryan took swings at the ball. The jury believed Ryan in its factual findings so Judge Kapetan ruled no duty because Heflebower assumed the risk. Heflebower asked for $2.7 M. The jury was out a day and a half. Plaintiff's new trial motion was denied.

**Chris Beeman** and **Ashley Meyers** of Clapp, Moroney, Vucinich, Beeman & Scheley were successful in obtaining an order of dismissal following an Anti-SLAPP

*Continued on page 40*

## President's Message

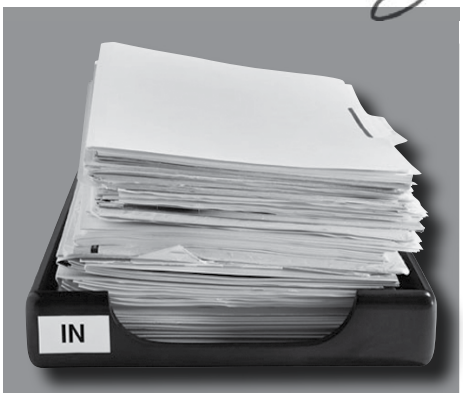
*– continued from page 2*

Finally, I would like to thank the *Defense Comment* editors-in-chief, David Levy and Ellen Arabian-Lee, for their continued excellent efforts in producing the best periodical for California and Nevada civil defense practitioners. The ADC is committed to excellence in content so that our members have current information at their fingertips that is a pleasure to read. This is largely achieved through the tireless efforts of Dave and Ellen, and all our members who write thought-provoking articles for the magazine.

We have an energetic dedicated Board for 2017. We welcome new board members Jeffrey Ta, Kasey Townsend, Jeffrey Levine and Marie Trimble Holvick. The Board looks forward to working hard to serve you the members of the ADC. We are excited, energized and look forward to moving our profession forward, while having a great time in 2017. Please call me or send me an e-mail with your needs and/or desires and do not hesitate to let us know of anything the Association can do to help meet your professional expectations. I wish you all a prosperous year!

Thanks,

**Enrique Marinez, ADCNCN President**




***Defense Comment* wants to hear from you. Please send letters to the editor by e-mail to David A. Levy at *dlevy@smcgov.org***

**We reserve the right to edit letters chosen for publication.**

## CDC Report

*– continued from page 3*

"health care services, education services, child care, rent, interest, and services represented by very small businesses", but many questions of simple definition will remain. Is legitimate massage a health care service? Are singing lessons, or golf lessons, or apps designed to teach a foreign language education services?

What about services by various entities in business to business transactions which combine to create the ultimate product? Some system must be devised to prevent the "stacking" of taxes which would result. And in a world-wide economy, would the application of sales tax to certain services simply push the provision of those services off-shore? Many services can quite easily be provided from anywhere in the world.

For civil defense practice, would representation provided by panel counsel and those provided in-house by insurers or in-house corporate lawyers be treated the same, since the services are functionally the same?

Finally, there are very significant political considerations to the proposal. Sales taxes are regressive, in that a given percentage affects the working class much more than the wealthy. Then too, voters just approved the extension of income tax surcharges on roughly the top two percent until 2028. What is the appetite for further significant tax law changes?

Senator Hertzberg is a big personality who thinks big. He will need to, given the complexities and potential unintended consequences of SB 640.

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**The Association of Defense Counsel of Northern California and Nevada has a wealth of valuable information available to you at *www.adcncn.org,* including Discussion Forums, links to the Judicial Council, an Attorney Locator, an up-to-date Calendar of Events, online meeting registration, archives of important and timely articles and legislative updates including back issues of *Defense Comment* magazine, and a Members-Only section.**

## Log on today.

# ASSOCIATION OF DEFENSE COUNSEL OF NORTHERN CALIFORNIA AND NEVADA

## Membership Application

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ADDRESS: _____

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TELEPHONE: _____ BIRTHDATE *(year optional)*: _____

FAX: _____ NAME OF LAW SCHOOL: _____

E-MAIL: _____ YEAR OF BAR ADMISSION: _____

WEB SITE: _____ BAR NUMBER: _____

Number of Years: Associated with Firm? _____ Practiced Civil Defense Litigation? _____

Are you currently engaged in the private practice of law? ☐ Yes ☐ No

Do you devote a significant portion of your practice to the defense of civil litgation? ☐ Yes ☐ No

Practice area section(s) in which you wish to participate (please check all that apply):

| | | | |
|---|---|---|---|
| ☐ | Business Litigation | ☐ | Landowner Liability |
| ☐ | Construction Law | ☐ | Public Entity |
| ☐ | Employment Law | ☐ | Toxic Torts |
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| ☐ | Insurance Law and Litigation | ☐ | Young Lawyer |

**MEMBERSHIP** into the Association of Defense Counsel of Northern California and Nevada is open by application and approval of the Board of Directors to all members in good standing with the State Bar of California or Nevada. A significant portion of your practice must be devoted to the defense of civil litigation.

**MEMBERSHIP FEES:** Annual dues for ADC membership are based on your type of defense practice (staff counsel or independent counsel) and, for independent counsel, the length of time in practice and the number of ADC members in your firm. The following are the base fees:

| | | | |
|---|---|---|---|
| ☐ | Regular Members: | $295 | Independent Counsel in Practice for More Than Five Years |
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Name Firm

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Signature of Applicant Date

Contributions or gifts (including membership dues) to ADC are not tax deductible as charitable contributions. Pursuant to the Federal Reconciliation Act of 1993, association members may not deduct as ordinary and necessary business expenses, that portion of association dues dedicated to direct lobbying activities. Based upon the calculation required by law, 15% of the dues payment only should be treated as nondeductible by ADC members. Check with your tax advisor for tax credit/deduction information.

***Please return this form with your payment to:***

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motion in Alameda County. The Plaintiff was a landlord whose tenants had sought counseling from their client (a non-profit organization that provided landlord/tenant counseling and mediation services) regarding recent rent increases and a lease termination. The Judge ruled that the communications which were the subject of Plaintiff's suit were privileged and protected speech under Civ. Code §47(b)(2)-(4) and Civ. Proc. §425.16(b). Their client was dismissed from the action and a motion for attorney fees is pending.

## welcome, new members

**Since October 2016, the following attorneys have been accepted for membership in the ADC. The Association thanks our many members for referring these applicants and for encouraging more firm members to join.**

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Santa Ana
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A·D·C VERITAS

Association of Defense Counsel of Northern California and Nevada

# 57TH Annual Meeting

# DECEMBER 8-9, 2016

2017 ADCNCN Board of Directors

2016 ADC President, Dave Daniels, passes the gavel to incoming president, Enrique Marinez

Outging ADC President, Dave Daniels, presents Ralph Woodard with the Nathan Holt Memorial "Friend of ADC" Award

2016 ADC President addresses the board

Justice Arthur Gilbert, Annual Meeting Keynote Speaker

Gunnery Sgt. Nick Popaditch signing books

For more Annual Meeting photos, visit the website: *www.adcncn.org*.

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# 2017

# Calendar of Events

## Save the Dates!

| | | |
|---|---|---|
| March 24, 2017 | **Jury Psychology Seminar and Judicial Reception** | Sutter Club, *Sacramento, CA* |
| April 28, 2017 | **Construction Defect Seminar** | DoubleTree by Hilton, *Pleasanton, CA* |
| May, 2017 | **Toxic Tort Seminar Series** | *San Francisco, CA* |
| August 18-19, 2017 | **Law Firm Management Seminar** | Resort at Squaw Creek, *Olympic Valley, CA* |
| September, 2017 | **Basic Training Series** | *TBD* |
| April 28, 2017 | **24th Annual Golf Tournament** | Silverado Resort & Spa, *Napa, CA* |
| December 7-8, 2017 | **58TH Annual Meeting** | Westin St. Francis, *San Francisco, CA* |

Please visit the calendar section on the ADC website – *www.adcncn.org* – for continuous calendar updates.