The Arizona Association of Defense Counsel

Common Defense

Spring 2017

A Magazine for Arizona Defense Attorneys

2016 Tucson and Phoenix Holiday Judicial Receptions

Judicial honorees, award winners and more.
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2017 AADC Annual Meeting

Thursday and Friday, June 1-2 at the Westin Kierland Resort & Spa, Scottsdale, Arizona

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Annual Barry Fish Memorial Golf Tournament

Join us May 5th at the Whirlwind Golf Club at Wild Horse Pass, Chandler, Arizona

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President's Message

THE FUTURE IS NOW

As we move into the second decade of this new century, the AADC understands that it is only as relevant as its members perceive it to be. Like any professional association, the AADC aims to meet its members' needs as those needs evolve. We know that those needs are forged by the legal climate we work in and the technology we work with. We also know that our membership will be driven by our ability to connect with the newest initiates to our profession.

For 2017 the AADC has decided to make several changes to established events and to add some fresh new events to our calendar. The 22nd annual Barry Fish Memorial Gold Tournament that benefits the Arizona Chapter of the ALS Foundation will be held on May 5--a Friday rather than a Saturday—and at a new location. This year's event will be held at the beautiful Whirlwind Golf Club at the Sheraton Grand Wild Horse Pass Resort just south of Ahwatukee. By moving this fundraiser and association tradition to a Friday, we hope to interfere less with the priceless personal and family time of our members and sponsors. A nod to work-life balance considerations, to be sure. For those family members who are looking for a distraction, however, there will be an AADC discount at the beautiful Aji Spa!

Our annual conference will also get a significant face-lift this year. Rather than holding the event over a weekend as in years past—again encroaching on our members' family time—we are hosting this year's event on Thursday and Friday, June 1 and 2, at the Westin Kierland Resort in Scottsdale. Thursday evening will feature a cocktail reception hosted by one of our sponsors, The Kenrich Group, followed by dine-around dinners at local eateries in the nearby Kierland Commons and Scottsdale Quarter. These dinners will be hosted by various AADC sponsors who are such an integral part of our association and will provide an ideal opportunity for members and sponsors to spend an evening together over a fine meal with good company. Friday's itinerary will begin with a continental breakfast and a panel discussion on appellate advocacy, followed by a live oral argument before Division 1 of the Arizona Court of Appeals. The featured case, *Sloan v. Farmers Insurance*, is an insurance bad faith case in which the jury returned a defense verdict in favor of Famers only to have the trial court set aside the verdict, pursuant to Rule 60(C)(6), based on a later DPS investigation which documented misconduct by two Phoenix Fire Department investigators who worked the Sloan arson case. Following the argument, a panel of judges and lawyers will discuss the case, the presentations to the court and offer tips to practitioners about effective oral advocacy. Friday afternoon will be filled with complimentary CLE topics on appellate practice, effective advocacy and insurance bad faith issues to be punctuated by a wine and cheese reception to conclude the day.

The AADC is also undertaking to recognize our newest members by hosting events that are organized by or targeted at them. Our YLD division will host the AADC's annual softball charity tournament on March 25 in Tempe and we are planning several social events that celebrate our associates and young partners like the event we held last October at the OHSO brewery in Arcadia. Stay tuned for specifics this summer and fall. We are in the process of making our YLD president an official AADC board member and we are seeking the input of our YLD leadership on a regular basis as it relates to our event programming, our CLE agenda and our means of communicating with our membership. My primary goal as president of the AADC has been to communicate clearly that this organization is committed to its youth and understands that its future will be charted by those who were born in 1980s and 1990s. As this year's calendar unfolds, I trust that our commitment will be evident.

Craig McCarthy, Esq.
President

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Correspondence and articles are welcome and should be sent to the Editor. Email articles for submission to Amy Wilkens at awilkens@lorberlaw.com. The right is reserved to select materials to be published. Material accepted for publication becomes property of the Arizona Association of Defense Counsel.

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2017 AADC CALENDAR OF EVENTS

To register for any of these events go to the AADC website, www.azadc.org.

SPECIAL EVENTS AND CLE's

22nd Annual Barry Fish Memorial Golf Tournament
Friday, May 5, 2017
Whirlwind Golf Course at Wild Horse Pass
5692 W. North Loop Rd.
Chandler, AZ 85226
Registration is online at www.azadc.org

SAVE THE DATE AADC Annual Meeting
June 1-2, 2017
Westin Kierland Resort & Spa
6902 E. Greenway Parkway
Scottsdale, AZ

ADVOCACY LUNCHEONS

Advocacy luncheons are held from 12 - 1 pm at Gust Rosenfeld, One E. Washington St., 15th Floor, Phoenix

May 10, 2017 'Immigration Basics for Litigators'
Speaker: Fae Sowders

Arizona Court of Appeals Reverses $1 Million Award of Punitive Damages in Insurance Bad Faith Case for Alleged "Institutional Bad Faith"

By Nathan D. Meyer, Esq. and Micalann Pepe, Esq.
Jaburg Wilk

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In *Sobieski v. Am. Standard Ins. Co. of Wisconsin,* 240 Ariz. 531, 382 P.3d 89 (App. 2016), despite upholding a bad faith judgment for an insurer conducting an unreasonable investigation and denying a claim, the Court of Appeals reversed a $1 million award of punitive damages. In so holding, the Court of Appeals continued Arizona's trend of reducing or reversing punitive damages in bad faith cases and distinguished the alleged "institutional bad faith" of the Insurer in *Sobieski* from the insurer in *Nardelli v. Metropolitan Group Property & Casualty Insurance*.[1]

Facts & Procedural History

The *Sobieski* case arose from an uninsured motorist ("UM") claim. The Insured, while riding a motorcycle, was badly injured when he rear-ended an uninsured car after it slowed to make a turn and then stopped abruptly.[2] The Insured had $100,000 of UM coverage. The Insurer twice denied the claim because it concluded the Insured was at fault for the accident.[3] The Insureds[4] sued the Insurer for breach of contract. An arbitrator allocated 60 percent of fault to the Insured and found that the Insured incurred $950,000 of damages, so the Insured's total damages of $380,000 significantly exceeded the $100,000 UM limits.[5] The Insurer paid the policy limits.

The Insureds sued the Insurer again—this time for bad faith and punitive damages. Regarding bad faith, the Insureds alleged the Insurer unreasonably investigated and denied the UM claim.[6] Regarding punitive damages, the Insureds did not allege the Insurer intended to injure them by performing an unreasonable investigation, by unreasonable claims handling policies, or that the Insurer deliberately engaged in routine claims practices intended to benefit the Insurer at the expense of insureds.[7] Rather, in *Sobieski*, the Insureds

1 230 Ariz. 592, 277 P.3d 789 (App. 2012). To obtain a previous article regarding the "low to moderate"

2 *See Sobieski,* 240 Ariz. at 533, 382 P.3d at 91.

3 *Id.* at 533-34, 382 P.3d at 91, 92.

4 Both the insured motorcyclist and his wife sued the Insurer.

5 *Id.* at 534, 382 P.3d at 92.

6 *Id.* Although not the focus of this article, the Court of Appeals held the Insureds presented sufficient evidence from which the jury could conclude the Insurer's investigation of the claim was unreasonable because: (1) the Insurer knew there were five witnesses to the accident, but spoke only to the Insured and the Uninsured Motorist; (2) the Insurer reached a first conclusion regarding liability before it received the Accident Report; (3) the Insurer had reason to question the Uninsured Motorist's account of the Accident; (4) after the Insurer re-opened the claim because of statements from witnesses casting additional doubt on the Uninsured Motorist's account of the accident, the Insurer performed no additional investigation before it reached a second conclusion regarding liability and it denied the claim a second time; (5) the Insurer's decision to not interview other witnesses because it thought the witnesses would be biased in favor of the Insured, was undermined by the fact that the Uninsured Motorist's account of the Accident was clearly biased in favor of the Insurer; and (6) despite knowing the Insured's damages were significant, so even a slight amount of comparative fault applied to the Uninsured Motorist could result in at least some recovery to the Insured, the Insurer failed to investigate and apply comparative fault. *Id.* at 534-35, 382 P.3d at 92- 93.

7 *Id.* at 536, 382 P.3d at 94.

alleged the Insurer's bad faith "was driven by business policies that compelled the company's claims handlers to favor corporate profits at the expense of its insureds."[8] The Insureds likened the Insurer's conduct to the conduct of the insurer in *Nardelli*[9] and alleged five broad categories of evidence indicated claims adjusters denied the Insureds' claim because of "undue pressure" from the Insurer "to promote company profits at the expense of" insureds: (1) claims department business plans, (2) company-wide incentive-pay programs, (3) employee performance reviews and personnel files, (4) claims manager training materials, and (5) a mandate to claims employees to focus on comparative negligence in adjusting claims.[10] The jury awarded the Insureds $500,000 of compensatory damages and $1 million of punitive damages.[11] The trial court denied the Insurer's motions for judgment as a matter of law and new trial.

Holding

The Court of Appeals held that a close review of the record revealed "no evidence" that the Insurer's "business plans, employee evaluations, compensation programs or training materials were designed or applied with the purpose of arbitrarily reducing or denying claims to further the [Insurer's] bottom line, or that those plans, materials or programs had any inappropriate effect whatsoever on how claims employees handled the [Insureds'] claim."[12] Accordingly, *Sobieski* reversed the $1 million award of punitive damages.[13]

Rationale

The Court of Appeals began its analysis by stating the legal principles guiding the imposition of punitive damages in Arizona.[14] Next, *Sobieski* analyzed the conduct warranting an award of punitive damages against the insurer in *Nardelli.*[15] Then, the Court of Appeals analyzed the five categories of evidence that allegedly caused undue pressure on claims adjusters to promote company profits at the expense of insureds.

First, regarding business plans, *Sobieski* held the plans "contain no support for the assertion that the [Insurer] sought to turn its claim department into a 'profit-center'

8 *Id.*

9 230 Ariz. 592, 277 P.3d 789. To obtain a previous article regarding the "low to moderate" reprehensible conduct warranting punitive damages in Nardelli, but the Court of Appeals nevertheless upholding a $54 million reduction of the punitive damages award, e-mail Nathan D. Meyer at ndm@jaburgwilk.com or Micalann C. Pepe at mcp@jaburgwilk.com. In Nardelli, the Arizona Court of Appeals found the following facts presented clear and convincing evidence that the Insurer acted with an "evil mind" when it decided to repair rather than total an insured's the theft-recovered vehicle: (1) the insurer "instituted an aggressive company-wide profit goal for 2002"; (2) the insurer "assigned the claims department a significant role in achieving that goal"; (3) the insurer "aggressively communicated this goal to the claims department (including the office and employees handling [the Insureds'] claims)"; (4) the insurer "tied the benefits of claims offices and individuals to, among other things, the average amount paid on claims"; (5) the insurer's efforts to reach its profit goal influenced how its employees handled claims; and (6) the insurer did nothing to ensure its focus on meeting its profit goal did not affect how its employees handled, evaluated and assessed claims." Id. at 605, 277 P.3d at 802.

10 *Sobieski,* 240 Ariz. at 537, 382 P.3d at 95.

11 *Id.* at 534, 382 P.3.d at 92.

12 *Id.* at 542, 382 P.3d at 100.

13 *Id.* at 543, 382 P.3d at 103.

14 "A breach of the duty of good faith and fair dealing is not sufficient, by itself, to support a claim for punitive damages." *Id.* at 535, 382 P.3d at 93. "There must be circumstances of aggravation or outrage, such as spite or 'malice,' or a fraudulent or evil motive on the part of the defendant, or a *conscious and deliberate disregard* of the interests of others. We restrict punitive damages to those cases in which the defendant's wrongful conduct was guided by evil motives. Thus, to obtain punitive damages, plaintiff must prove that defendant's evil hand was guided by an evil mind. The evil mind which will justify the imposition of punitive damages may be manifested in either of two ways. It may be found where defendant intended to injure the plaintiff. It may also be found where, although not intending to cause injury, defendant consciously pursued a course of conduct knowing that it created a substantial risk of significant harm to others. Such damages are recoverable in bad faith tort actions when, *and only when,* the facts establish that defendant's conduct was aggravated, outrageous, malicious or fraudulent. When defendant's motives are shown to be so improper, *or* its conduct so oppressive, outrageous or intolerable that such an "evil mind" may be inferred, punitive damages may be awarded." *Id.* (italics in original) (citing *Rawlings v. Apodaca*, 151 Ariz. 149, 162–63, 726 P.2d 565, 578–79 (1986) (citations omitted)). Furthermore, "a plaintiff suing for punitive damages must prove the defendant's 'evil mind' by clear and convincing evidence." *Sobieski,* 240 Ariz. at 536, 382 P.3d at 94 (citing *Linthicum v. Nationwide Life Ins.,* 150 Ariz. 326, 332, 723 P.2d 675, 681 (1986)). "Punitive damages are appropriate only in the most egregious of cases, upon proof of both the defendant's reprehensible conduct and evil mind." *Sobieski,* 240 Ariz. 536, 382 P.3d 94 (citing *SWC Baseline & Crismon Inv'rs, L.L.C. v. Augusta Ranch Ltd. P'ship*, 228 Ariz. 271, 289, ¶ 74, 265 P.3d 1070, 1088 (App. 2011)). The Arizona "supreme court has made clear that an insurer does not open itself to punitive damages simply by considering its own interests in denying a claim." *Sobieski,* 240 Ariz. at 536, 382 P.3d at 94 (citing *Gurule v. Ill. Mut. Life & Cas. Co.,* 152 Ariz. 600, 607, 734 P.2d 85, 92 (1987) ("Self-interest is not, however, evidence of an 'evil mind.'")). "Because punitive damages may be awarded only when they will serve to punish a defendant that acted with an evil mind, the defendant's motives are determinative." *Sobieski,* 240 Ariz. at 536, 382 P.3d at 94 (citing *Bradshaw v. State Farm Mutual Automobile Insurance,* 157 Ariz. 411, 422, 758 P.2d 1313, 1324 (1988)).

15 *Sobieski,* 240 Ariz. 536-37, 382 P.3d at 94-95. *See* note 10, *supra.*

at the expense of its insureds" for the following reasons: (a) the "plans set no arbitrary goals for claims payouts"; (b) the plans "did not direct adjusters to keep company profits in mind when settling claims"; (c) "a company keeping statistics on resolution of claims and looking to their bottom line are reasonable internal procedures; particularly [if an insured] has offered no evidence that this behavior ever resulted in the denial of a legitimate (or illegitimate) claim"; (e) "an insurer does not open itself to punitive damages simply by taking steps to monitor profitability"; (f) there was no evidence that "company officers directed adjusters to reduce claims payouts to enhance the company's bottom line"; and (f) on the contrary, the plans emphasized customer (insured) service and satisfaction and an Insurer philosophy to "pay what we owe."[16]

Second, regarding compensation policies, the Court of Appeals held that, unlike *Nardelli*: (a) there was no evidence that "any specific severity[17] goal was imposed on the claims office that handled the [Insureds'] claim"; (b) there was no evidence that "compensation paid to claims employees was linked to their success in limiting claims payouts"; and (c) the Insurer's "incentive plan was a company-wide profit sharing program in which all employees could be rewarded in accordance with the company's overall performance," including non-claims related activity such as return on Insurer investments.[18]

Third, regarding claims employee personnel files, *Sobieski* held "employee personnel files in the record offer no support for the argument that [Insurer] management encouraged claims workers to arbitrarily or unreasonably deny claims," because: (a) there was no evidence of "documented demands managers placed on claims workers…to handle claims with a 'laser-like focus' on meeting company profit goals"; (b) there was no evidence or inference that the pertinent claims manager "encouraged his employees to deliberately short-change insureds to improve company profits or his standing within the company"; and (c) again, the personnel files included praise for the pertinent adjuster's customer (insured) service.[19]

Fourth, regarding training materials for claims managers, the Court of Appeals noted that the materials' answer to the question, "How can a manager control severity?" belied the contention that the Insurer "trained its managers to control severity by short-changing claimants."[20]

Fifth, regarding corporate documents urging claims employees to apply comparative fault, *Sobieski* noted: (a) "there is nothing wrong in the abstract with an insurer seeking to lay off an appropriate share of the liability on a third party's insurer when the third party is at fault"; and (b) there was no evidence that "an improper [Insurer] focus on comparative fault drove [the Insurer] to deny the [Insureds] claim."[21] Rather, the Insureds argued that the Insurer committed bad faith by *failing* to apply comparative fault.[22]

Analysis

There are at least two significant take-ways from *Sobieski*. First, *Sobieski's* reversal of the $1 million award of punitive damages continues Arizona's trend of reducing or reversing punitive damages awards in bad faith cases. Four years ago in *Nardelli,*[23] the Court of Appeals upheld a trial court's reduction of a $55 million punitive damages award in an insurance bad faith case to only $620,000, *and* further reduced the punitive damages award to only $155,000—a 1:1 ratio with compensatory damages. Two years ago in *Arellano v. Primerica Life Insurance Company*,[24] the Court of Appeals again reduced a punitive damages award in an insurance bad faith case of approximately $1.1 million to only $328,000—a 4:1 ratio with compensatory damages.

Second, insurers should note the distinctions that the Court of Appeals drew between the

16 *Id.* at 537-39, 382 P.3d at 95-97.

17 *Sobieski* explained "severity" as "amounts paid out on claims." *Id.* at 540, 382 P.3d at 98.

18 *Id.* at 539, 382 P.3d at 97.

19 *Id.* at 539–41, 382 P.3d at 89, 97–99 (internal citations omitted).

20 *Id.* at 541, 382 P.3d at 99. The answer focused upon encouraging adjusters to exercise their curiosity by conducting "great investigations" so that a "file supports the information that's in it." *Id.*

21 *Id.* at 541-42, 382 P.3d at 99-100.

22 *Id.*

23 230 Ariz. 592, 277 P.3d 789. Again, to obtain a previous article regarding *Nardelli* upholding a $54 million reduction of the punitive damages award, e-mail Nathan D. Meyer at ndm@jaburgwilk.com or Micalann C. Pepe at mcp@jaburgwilk.com.

24 235 Ariz. 371, 332 P.3d 597 (App. 2014). To obtain a previous article regarding *Arellano* upholding a $700,000 reduction of punitive damages, e-mail Nathan D. Meyer at ndm@jaburgwilk.com or Micalann C. Pepe at mcp@jaburgwilk.com.

Arizona Court of Appeals *(continued)*

insurer's conduct in *Nardelli* and the Insurer's conduct in *Sobieski* to help insulate themselves from bad faith claims and punitive damage awards based on "institutional bad faith." At the risk of stating the obvious, Insurers should *not:* (a) "set arbitrary goals for claims payouts";[25] (b) "direct adjusters to keep company profits in mind when settling claims"[26] or "reduce claims payouts to enhance the company's bottom line";[27] (c) set "any specific severity goals";[28] (d) link "compensation paid to claims employees...to their success in limiting claims payouts";[29] (e) document employee personnel files to include manager demands or encouragement to handle claims or deliberately short-change insureds with a focus on meeting company profit goals, improving company profits, or improving the manager's standing within the company";[30] or (f) "train its managers to control severity by short-changing claimants."[31] Equally at the risk of stating the obvious, insurers *should*: (a) emphasize customer (insured) service and satisfaction in business plans;[32] (b) emphasize a philosophy to "pay what we owe" in business plans;[33] (c) make incentive pay plans available to all employees—not just claims employees—linked to overall company performance, including non-claims related activity;[34] and (d) document personnel files with praise and an emphasis on customer (insured) service.[35]

25 *Sobieski,* 40 Ariz. 537, 382 P.3d at 95.

26 *Id.* at 538, 382 P.3d at 96.

27 *Id.*

28 *Id.* at 539, 382 P.3d at 97.

29 *Id.*

30 *Id.* at 539-41, 382 P.3d at 97-99.

31 *Id.* at 541, 382 P.3d at 99. The answer focused upon encouraging adjusters to exercise their curiosity by conducting "great investigations" so that a "file supports the information that's in it." *Id.*

32 *Id.* at 538, 382 P.3d at 96.

33 *Id.* at 538, 382 P.3d at 96.

34 *Id.* at 539, 382 P.3d at 97.

35 *Id.* at 539-41, 382 P.3d at 97-99 (internal citations omitted).

Leading Millennials

By Alison R. Christian, Esq.
Shareholder at Christian, Dichter, & Sluga, P.C.

Alison R. Christian, Esq.

"Should you ever find yourself on your path, moving along in spite of fear, wondering if you're ready or not to rise to the next level, chances are great that you will not be ready. Rise anyway." – The Universe

This quote captures the Millennial mindset. They are a generation unbound by limitations. They know what they want and they are not afraid to go after it, even if they ruffle a few feathers along the way. Resist the temptation to lump them into negative generalizations and judge them by stereotypes. Like it or not, Millennials are shaking up the legal profession. For the better.

I know what you are thinking. *They are so entitled! They want accolades and accommodations! They don't understand the importance of hard work! How can we work with them if they are always on vacation?* I hear your concerns and, trust me, I know what you mean. Not only do I have the honor of being a Millennial (barely), but I also have the pleasure of leading Millennials on a daily basis. It is not an easy task, but it is one that has forced me into mindful leadership, and has made me a better, more conscientious, leader.

1. Who Are "Millennials" and Why Do They Matter?

The definition of Millennial varies depending on the source. It typically includes anyone born between 1980 and the mid-1990s, although that same time period has also been described as Gen Y, Echo Boomers, and the Net Generation.[1] According to the abridged version of the 2016 Gallup report, "How Millennials Want to Work and Live," the term "Millennial" includes the roughly 73 million individuals born between 1980 and 1996.[2]

1 Philip Bump, *Your Generational Identity Is A Lie*, THEWASHINGTONPOST.COM, April 1, 2015, https://www.washingtonpost.com/news/the-fix/wp/2015/04/01/your-generational-identity-is-a-lie/?utm_term=.6b5670a169bf.

2 Jim Clifton, *How Millennials Want to Work and Live (Abridged)* at 4, GALLUP.COM, (2016), http://www.gallup.com/reports/189830/millennials-work-live.aspx.

The satirical website, Urban Dictionary, defines "Millennial" as:

> Special little snowflake. Born between 1982 and 1994 this generation is something special, because Mom and Dad and their 5th grade teacher Mrs. Winotsky told them so. Plus they have a whole shelf of participation trophies sitting at home so it has to be true. They believe themselves to be highly intelligent, the teachers and lecturers constantly gave them "A"s in order to keep Mom and Dad from complaining to the Dean. Unfortunately, nobody explained to them the difference between and education and grade inflation so they tend to demonstrate poor spelling and even poorer grammar. At work, millennials believe themselves to be overachievers who just aren't understood by their loser bosses. Even Mom said so when she showed up for the interview. They are the only generation in the universe to understand the concept of work life balance and to actually want to find a fulfilling career. All those Gen X losers just don't get it, what with hoping to keep their jobs and pay the bills, but they are just corporate drone so who cares what they think? They should be smart like Millennials and get Mom and Dad to pay

> for that stuff until they can work out what they want to do with their lives and then get rich doing it.[3]

That is the image most people have of Millennials. Partly due to Millennials' actions. But largely due to an institutional reluctance to embrace change.

No generation is without its challenges. The challenge for Millennials is that they are the first generation of lawyers to grow up with technology. Gallup CEO Jim Clifton describes them as "first generation digital natives who feel at home on the Internet."[4]This is an advantage. Even though most of them wouldn't know that a pocket part isn't a skinny jean trend, they have better and more comprehensive access to legal research tools than any other generation of lawyers. Laptops, wireless internet, and mobile devices make it possible for Millennials to be as productive remotely as they would be in the office (if not more so). Videoconferencing, real-time transcripts, and webinars make it easier for Millennials to interact with clients and other lawyers without disruptive and expensive travel.

The challenge is that technology can also take its toll. Baby Boomers logged long hours at the office, but didn't risk getting an email from the boss or a client once they got home. Millennials are "available" around the clock, with many firms expecting increased productivity and responsiveness as a result. Even most airplanes, restaurants, and hotels are equipped with wireless internet. Vacations aren't really vacations anymore. This heightened accessibility forces Millennials to be more intentional about setting boundaries and taking personal time than any other generation. I saw a post online the other day from someone complaining about an "out of office" response that said the person was "unavailable". The comment said there was no such thing anymore and it was unacceptable to suggest otherwise. This atmosphere means Millennials need to initiate conversations about personal time more than other generations. That alone creates tensions in law firms.

Millennials are also the first generation unmotivated by purely financial gain. Hefty salaries and year-end bonuses used to provide firms with enough leverage to demand 2000+ billable hours a year from associates. These days, firms must offer much more than money. Don't get me wrong – Millennials still want to get paid, and paid well. The challenge is that firms must communicate a purpose and meaning beyond financial incentives. They must have supervisors who are willing to teach and train young lawyers, not just assign projects. They must be committed to finding opportunities for their associates to grow their strengths. Most importantly, they must have leaders with a vision.

As Jim Clifton asked in the Gallup report, "Why does any of this matter?"[5]

Law firms should care about keeping this generation engaged a great deal. According to the 2016 Minnesota State Bar President, Robin Wolpert, Millennials "represent 40 percent of *today's* workforce and are the biggest and most powerful customer group *today.* By 2017, they will carry the bulk of the world's spending power. By 2025, millennials will make up 75 percent of our employees and customers. If we want to thrive and succeed as a profession, we cannot afford to ignore millennials. They are our clients and potential clients. They will soon be the face of our profession in every sector of the legal services market."[6]

Only 29% of Millennials are engaged at work, however, and another 16% are actively disengaged (meaning they are out to damage the company).[7] Even though 21% of Millennials reported changing jobs within the last year, 60% of Millennials remain open to a different job opportunity.[8] Millennial turnover costs the U.S. economy an estimated $30.5 billion each year.[9] As summarized by Mr. Clifton in the Gallup report, "If millennials cannot find good jobs, the economy will continue to lag. If they are not engaged in those jobs, companies' profitability, productivity and innovation will suffer. And if they are not thriving in their well-being,

3 http://www.urbandictionary.com/define.php?term=Millennial

4 Jim Clifton, *How Millennials Want to Work and Live (Abridged)* at 12, GALLUP.COM, (2016), http://www.gallup.com/reports/189830/millennials-work-live.aspx.

5 *Id.* at 4.

6 Robin Wolpert, *Empowering Our New Lawyers*, MNBENCHBAR.COM, November 3, 2016, http://mnbenchbar.com/2016/11/empowering-our-new-lawyers/ (emphasis in original).

7 Jim Clifton, *How Millennials Want to Work and Live (Abridged)* at 7, GALLUP.COM, (2016), http://www.gallup.com/reports/189830/millennials-work-live.aspx.

8 *Id.* at 9.

9 *Id.*

they will struggle in life, affecting how they perform as citizens, consumers and employees."[10]

2. What Do Millennials Want?

A recent blog article for Hired.com by Whitney Ricketts lists three characteristics that Millennials look for in an employer: opportunities for growth, quality management, and interesting work.[11] These sound simple enough, but they continue to present a challenge for law firms. Decades of tradition established a framework for how law firms operate. Associates are recruited from top law schools to work grueling hours for the first few years of their careers. They are assigned the least desirable projects and typically have little say in what lands on their desks. They meet with management for formal feedback once a year during year-end reviews. If they are lucky, a successful partner takes an interest in them and shares advice on how to develop a book of business. A select group of associates then goes on to become the next round of partners and the cycle continues. One can see why this model may not entice entrepreneurial Millennials.

"Interesting" work is often in the eye of the beholder (says the insurance coverage lawyer who could gleefully discuss the meaning of the word "occurrence" for hours[12]). Determining what interests your young lawyers is the first step in cultivating a good relationship with them. Presumably, they came to work at your firm for a reason. Engage them early on and identify that reason so you can find opportunities for them to cultivate it. If you have associates who want to handle litigation files, don't assign them to a transaction team. Similarly, if you have lawyers who want to make a difference in the world, see if they want to take on the firm's pro bono projects. Having these discussions early and often will benefit the firm, and its Millennials. The relationship will never work long-term if their needs are not aligned.

The next characteristic – opportunities for growth – also calls for greater communication within firms. Do you know your young lawyers' goals? Where do they see themselves in five years? What organizations do they want to join? What social causes are important to them? How much time do they have to devote to professional development? These are good questions to ask, even if young lawyers do not yet have answers. As Ms. Ricketts' blog points out, 87% of Millennials cite development as an important job factor, but less than half of them agree that their current job provided outlets for learning and growth in the past year.[13] The first step in providing those outlets is initiating conversations to understand what growth looks like for each individual.

The last characteristic, quality management, is where law firms may run into the biggest growing pains. Mr. Clifton reports, "The relationship between manager and employee represents a vital link in performance management. As is often the case, communication is crucial for that relationship to succeed."[14] The Gallup report also noted, "The more conversations managers have with their employees, the more engaged their employees become."[15] The time of year-end reviews as the only opportunity to sit down and evaluate both the law firm and the lawyer is over. Millennials want frequent and meaningful feedback on their performance.

Millennials also expect more from management – "they don't want bosses – they want coaches."[16] Put another way, Millennials do not want to be *directed*, they want to be *empowered*. For anyone supervising Millennials, this requires greater effort. I had several Millennial lawyers tell me that they want their input considered and their ideas valued, both in terms of specific projects and in strategic firm planning. They also prefer to understand objectives and be consulted about potential ways to achieve them, rather than simply be assigned

10 *Id.* at 5.

11 Whitney Ricketts, *What Do Millennials Want at Work? 3 Employer Dealbreakers,* HIRED.COM, December 8, 2016, https://hired.com/blog/employers/3-things-millennials-want-work/?utm_source=pocket&utm_medium=sponsor&utm_campaign=(a-all)(l-all)(r-all)(q1-17-jan-dedicated-email-what-do-millenials)&utm_content=dedicated-email-v2

12 Don't forget the lesson Tom Hanks taught us all in Bridge of Spies: insurance coverage lawyers are heroes.

13 Whitney Ricketts, *What Do Millennials Want at Work? 3 Employer Dealbreakers*, HIRED.COM, December 8, 2016, https://hired.com/blog/employers/3-things-millennials-want-work/?utm_source=pocket&utm_medium=sponsor&utm_campaign=(a-all)(l-all)(r-all)(q1-17-jan-dedicated-email-what-do-millenials)&utm_content=dedicated-email-v2

14 Jim Clifton, *How Millennials Want to Work and Live (Abridged)* at 10, GALLUP.COM, (2016), http://www.gallup.com/reports/189830/millennials-work-live.aspx.

15 *Id.* at 11.

16 *Id.* at 3.

Leading Millennials *(continued)*

tasks. One Millennial I interviewed said, "Millennials do not want to be cogs, they want to know that their contribution is valued and appreciated. That said, Millennials also want to make sure they are actually contributing, so helping them do so in a constructive, encouraging way, will help them be the contributing colleague you want them to be and will also motivate them."

This departure from tradition is a source of friction within firms. At our small firm, for example, we struggled with this element because there are fewer supervisors to go around. Giving each young lawyer the coaching he or she deserves means partners need to invest more non-billable time in the firm. And any time firms ask partners to invest more non-billable hours, they are asking them to give up either profits or personal time. Neither is particularly appealing; hence the friction. Another Millennial I interviewed, however, suggested that this coaching does not necessarily have to come from a partner. He said, "By mentorship I don't necessarily mean from the leader themselves. Suggesting that a long-term employee or senior associate mentor a new (Millennial) associate, or introduce them to a friend or colleague outside of the office that the Millennial can reach out to would work, too."

Discovering what success looks like for your firm's young lawyers, providing them with interesting opportunities through which they can thrive, and guiding them with individualized attention will require time and energy. Not all firms are up to the task. Admittedly, Millennial "job hopping" has made it very difficult for firms to invest energy in this talent pool and 60% of them are open to switching jobs in the next year. But as I once read:

> CFO: "What happens if we invest in developing our people and they leave us?"
>
> CEO: "What happens if we don't and they stay?"

3. What Can Law Firms Learn From Millennials?

Whenever I encounter a negative experience – a difficult attitude from opposing counsel, an unexpected outcome, an unhappy employee, rejection from a potential client – I take a step back and ask, "What I am supposed to learn from this?" I reflect on aspects of the experience that were in my control and identify

different choices I could have made to influence the outcome. I find myself taking this same approach when leading Millennials.

One common Millennial trait is that they are hungry for praise and appreciation. They want to know that their strengths are identified and developed. They do not want to talk about their weaknesses.[17] This impacts my leadership style a great deal. For example, I am a notoriously difficult editor. It's not my fault; it's genetic. I never hesitated to take a heavy red-pen to associate drafts in order to get the best product out the door. After hearing from more than one associate, however, that my editorial style made them want to crumple their draft into a ball, light it on fire, and throw it at my head, I decided to revisit my approach. I learned that they wanted me to focus on what they had done right and emphasize those "successes" before I identified what needed to change.

I can hear you now. *Why should we coddle them? No one praised my tiniest effort when I was an associate and I turned out fine. The most important thing is a good product.* I challenge you to think about the "product" a little differently.

Millennials do not have the same job loyalty as other generations. In fact, "The new normal is for Millennials to jump jobs four times in their first decade out of college. That's nearly double the bouncing around the generation before them did."[18] These statistics should startle law firms. When disenchanted associates leave, it impacts firm morale, profitability, and reputation. Firms that believe young lawyers are fungible do not yet understand Millennials. They risk watching their truly best "product" – their people – walk right out the door.

As a result of circumstances largely out of their control, Millennials grew up hearing the message they could, and should, have anything they want in an environment that catered to instant gratification. Want to know the answer to a question in seconds? Just Google it. Want to have an amazing meal delivered to your door within minutes? Download the UberEats app and click order. Don't want to risk the crushing humiliation of being rejected in person when asking someone out on a date? Match.com to the rescue. Believing that you are entitled to exactly what you want, exactly when you want it, is dangerous enough. Living in a technological age that has made it possible is a recipe for psychological disaster.

Simon Sinek is one of my favorite lecturers on leadership. His TedTalk, "How Great Leaders Inspire Action", is a must-watch.[19] His October 2016 appearance on "Inside Quest" about Millennials in the workplace is directly on point for this article and I recommend you also watch it.[20] One of his overarching themes is that people want to be inspired. They want to work at a place with an articulated purpose alongside leaders with a vision. This is one of the reasons Millennials struggle at law firms – they are notoriously traditional institutions whose "why" is rarely challenged.

If you asked most Traditionalists or Boomers why they became lawyers they would give you two answers: financial security and prestige. Law firms did not have to tout their ability to provide personal happiness and professional fulfillment as a recruitment tool. As Mr. Clifton recognizes in the Gallup report, "Back in the old days, baby boomers like me didn't necessarily need meaning in our jobs. We just wanted a paycheck – our mission and purpose were 100% our families and communities."[21]

As author and Duke Law School graduate Tucker Max observed, however, "Millennials have straight up rejected this system. They won't give their lives away just to 'win' an unwinnable race. Instead of the illusion of financial security, and the scarcity of status and prestige, Millennials have two primary ways they measure success: 1. Millennials want to be a part of something they find meaningful. Their work needs to matter, both to them and to

17 This is a very productive trait. Gallup discovered "that weaknesses never develop into strengths, while strengths develop infinitely. This is arguable the biggest discovery Gallup or any organization has ever made on the subject of human development in the workplace." Jim Clifton, *How Millennials Want to Work and Live (Abridged)* at 3, GALLUP.COM, (2016), http://www.gallup.com/reports/189830/millennials-work-live.aspx.

18 Heather Long, *The New Normal: 4 Job Changes By The Time You're 32,* MONEY.CNN.COM, April 12, 2016, http://money.cnn.com/2016/04/12/news/economy/millennials-change-jobs-frequently/.

19 Simon Sinek, *How Great Leaders Inspire Action*, TED.COM (Sept. 2009), https://www.ted.com/talks/simon_sinek_how_great_leaders_inspire_action.

20 David Crossman, *Simon Sinek on Millennials in the Workplace*, YOUTUBE.COM (Oct. 29, 2016), https://www.youtube.com/watch?v=hER0Qp6QJNU.

21 Jim Clifton, *How Millennials Want to Work and Live (Abridged)* at 3, GALLUP.COM, (2016), http://www.gallup.com/reports/189830/millennials-work-live.aspx.

the world. 2. Millennials want to build deep, authentic connections with people. They want real relationships."[22]

Millennials are therefore the first generation to make law firms answer the question, "What is our purpose?" The process in finding the answer will be as important as the answer itself. Many firms may discover that they have objectives (i.e. develop more clients, increase profitability, expand into a new practice area, etc.). They may even have a plan for achieving those objectives (i.e. join professional organizations, reduce expenses, attend seminars, etc.). But in order to keep Millennials engaged and happily employed, firms need to articulate why those objectives matter and how they can be achieved while still enjoying a balanced life.

This is where most firms encounter resistance. The changes that Millennials are asking for from law firms are *good* changes. They want greater flexibility in when and where they work, more attention paid to their professional development, a voice in firm decisions, freedom to spend guilt-free time with their families, and improved communication with firm management. These are all good things that would benefit most lawyers (a notoriously unhappy group of professionals). Problems arise, however, in the way the Millennial message is delivered.

Millennials tend to get in their own way. They enter the professional realm burdened by the expectation created by their childhood – "I want it, therefore I shall have it" – and when communicating their desires to law firms, Millennials overlook the sacrifices made by those who came before them. There are women who endured blatant sexual harassment for decades. They were trying to make it in a man's world with very few allies. Some of them sacrificed getting married and having children just so they could succeed as a lawyer. And for those who tried to have a professional and a home life, no one made it easy on them or cut them any breaks.

There are also men who put in fifteen to eighteen hour billable days for years, grinding away just trying to earn a living. Some of them rarely saw their wives and children, and never got to take the family vacations or make it to the weeknight sports games or school events. They were constantly trying cases and were expected to "suck it up" if they were sick. Hobbies? Yeah right. I can assure you no one was checking on the "personal fulfillment" level for these men.

The Millennial mindset can breed resentment in older lawyers, understandably so. The same lawyers whose life-long sacrifices created many of the law firms we know today are the ones being asked to accommodate a new generation of lawyers who expect to have it all at once. I get it. It doesn't seem fair. But there is a huge opportunity here where everyone wins. If Millennials want their message to be heard within firms, they need to work on their delivery. They should approach firms with greater humility, be ready to cooperate and work hard, and show respect to those who came before them. They should be patient, and should look for opportunities to demonstrate their commitment to the firm.

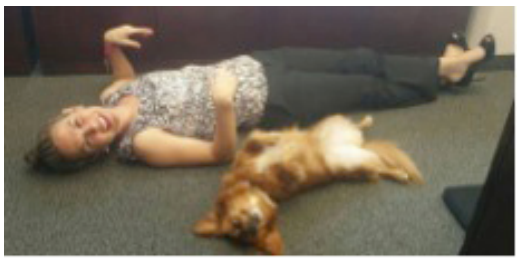
On the flip side, the Boomers and Gen X-ers need to open their minds, improve their communication skills, and be truly willing to try new things. Most importantly, however, they need to let go of resentment. The best way to do that is to set aside time for themselves. At our firm, for example, our partners started to recognize resentment building when asked to accommodate young lawyer (and employee) vacation schedules. Part of that stemmed from the fact that the partners were not taking vacations themselves. We did our best to enjoy marketing trips and conferences, but it wasn't the same as truly "turning off." To counteract that resentment, we made a point to set aside time for the partners. Ideally once a quarter. The change made us happier, more productive lawyers and is an example of the good that can come from embracing the Millennial mindset. Now, when partners are asked to carry an extra load while associates take time off, the partner knows their time will come, too.

4. We Can't Live Without Them, So How Do We Work With Them?

Our small firm is a living organism. If one person is having a bad day, everyone feels it. If there are too many closed doors, people get nervous. If a deposition goes awry and people start throwing water bottles at each other across the conference room table while shouting at the top of their

22 Tucker Max, *Millennials Aren't Entitled – They're Just Better Than You,* THOUGHTCATALOG.COM, December 15, 2016, http://thoughtcatalog.com/tucker-max/2016/12/millennials-arent-entitled-theyre-just-better-than-you/.

Leading Millennials *(continued)*



lungs, everyone wants to poke their heads out and see what's happening. Hypothetically.

Learning to lead this "organism" is an amazing experience. When I first became partner and was trying to get my sea legs, I read a book by Tony Hsieh called "Delivering Happiness." Tony joined Zappos.com as an advisor and investor and eventually became CEO. He helped Zappos.com grow from almost no sales to over $1 billion in gross merchandise sales annually, while simultaneously making Fortune magazine's annual "Best Companies to Work For" list.[23] The book is about his belief that happiness is a business model – a very good business model.[24] As their website describes, they "discovered that happiness is really good for business, increasing every positive business outcome including 300% more innovation [HBR], 37% increase in sales [Martin Seligman], and 31% increase in productivity [Greenberg & Arawaka] and decreasing everything that you don't want, 125% less burnout [HBR], 66% fewer sick leaves [Forbes], and 51% less turnover [Gallup]."[25] This idea of developing happiness first resonates with Millennials.

Seven of our firm's ten lawyers and two of our staff are Millennials. Naturally, happiness is something we actively cultivate. For example, we have two associates who bring their dogs to work. Margo, the long-haired red dachshund described as "half-dox-full-fox", comes on Tuesday and Friday. Casey, the golden retriever with an impeccable knack for knocking food out of your hand at lunch, comes on Monday and Wednesday. Thursday is Steve Dichter's day, since he still doesn't understand why we need dogs at the office. They have plush beds, toys, and their own special treats. They meander in and out of our offices and cubes, with a sixth sense for who needs them most. Their presence creates a noticeably improved and more relaxed atmosphere. More than once, I have hung up after a difficult conference call to sit in the hall and play fetch. Trust me, it helps.

In line with my role as Chief Happiness Officer, I implemented an associate incentive program last year that achieves two goals: capturing more billable time and getting our firm together for a meal every day. We noticed that associates were struggling to put their time in contemporaneously, causing productivity (and our administrator's sanity) to suffer at the end of the month. To encourage better time entry, we offered to buy everyone lunch (up to $10/day/person) for the week if every associate has their time entered for the previous week before our administrator gets in Monday morning. Each associate is in charge of ordering the firm's lunch one day a week.

The program was a positive change for a couple reasons. First, we get our invoices released and out the door quicker because we are not waiting for attorneys to enter time at the end of the month; quicker invoicing means quicker payment and improved cash flow. Second, the associates spend less time worrying about and getting lunch because for four days out of the week all they have to do is place an order and it comes to them. Third, our firm has a much greater sense of camaraderie and connection. The conversations we have around the lunch table get us out of our offices and talking. Some days we roundtable recent cases or brainstorm strategy. But more often we discuss important issues in the world and in each other's lives. This kind of authentic communication builds relationships and strengthens "purpose."

We also restructured our approach to annual reviews. Rather than meet once a year, we schedule two formal reviews (one mid-year and one at year-end), and we involve the associates in firm decisions throughout the year. For example, we started discussions about what kind of office space everyone wants since our lease expires soon. We asked whether people want to work from home and share offices, what features are most important to them, what part of town they want to be in, and whether they are comfortable spending more on space if it means we will all make less money. We also assigned an associate to work with our administrator to look at options and do site visits.

Along the same lines, any decisions about hiring are made as a firm. Everyone is invited to

23 http://deliveringhappiness.com/book/about-the-author/

24 http://deliveringhappiness.com/

25 http://deliveringhappiness.com/company/

Leading Millennials *(continued)*

look for potential candidates, and is part of the decision about whether we want to hire someone or work more hours and make more money. The interview process usually involves coming to our firm for lunch and getting to know the team. We make it clear to the associates that everyone's input is valued and appreciated. I understand that some of these examples are much easier for a small firm to implement, and firms have to determine what works best for them. But the objective (increasing associate involvement, cultivating happiness, and building meaningful relationships with your colleagues) are ones that firms should build into their cultures if they want to retain Millennials.

5. Leading The Charge

The AADC membership is uniquely situated to institute the kind of changes needed to effectively lead Millennial lawyers in the future. Many of our members serve on compensation committees and hiring committees within their firms and have the ability to create programs that will improve camaraderie and retention. They have the power to change policies, to influence attitudes, and to encourage their firms to adapt. When they talk, people listen. As with all sustainable change, it starts at the top. I encourage each of you to rise to the Millennial challenge. I look forward to hearing about positive changes your firm has implemented at the next AADC event.

Deep Work: Rules for Focused Success in a Distracted World Book Review

By Michele Feeney, Esq.
Michele M. Feeney L.L.C.

Michele Feeney, Esq.

An esteemed ASU professor stopped and hugged me on the street outside the new downtown law school one recent August afternoon. "That book you gave me changed my life," the professor said.

He was speaking of **Deep Work: Rules for Focused Success in a Distracted World,** by Cal Newport, which I'd given the professor for his fiftieth birthday a few months earlier.

Newport's premise is that we are losing the ability to perform meaningful work because of the busy work that eats up our days and depletes our energy. The trade off exacerbates as our responsibilities increase. For example, a new associate may enjoy delving into a complex legal question over a number of hours or days, while a senior partner has a difficult time finding thirty minutes to thoughtfully read and critique that same associate's research memo.

Newport explores questions like:

- What is the difference between visible busyness and intense focus?
- Do the routines and rituals of your life support performance at an elite level, or have the routines and rituals turned you into a human email router?
- Do you finish normal business hours unsure what you've accomplished, and then work in the early morning and evening, and on weekends—when you can hear yourself think and the rest of the world seems to be at rest?
- Do you budget the time, space and attention available for shallow work, thereby preserving energy for more important and lasting "deep work?"

Newport offers concrete, practical suggestions for how to organize your space and time in a manner that allows you to quickly master hard things and produce at an elite level, both in terms of quality and speed. He offers guidelines on how to enjoy the benefits of social media and virtually immediate communication without falling into a state of "distracted hyper-connectedness." Newport's suggestions collectively support the creation of islands of critical, creative and strategic thinking in our daily lives.

Newport describes the habits of notable and prolific individuals like J. K. Rowling, Woody Allen and Carl Jung, which share in common a discipline creating blocks of time and space that support clear thinking and sustained focus. He says: "The ubiquity of deep work among influential individuals is important to emphasize because it stands in sharp contrast to the behavior of most modern knowledge workers—a group that's rapidly forgetting the value of going deep."

It's a rare book that can change the life of a fifty-year old, impress a law professor, and inspire a mid-day hug in August in Phoenix.

Deep Work is that book.

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AADC Young Lawyers Division President's Message

By Micalann C. Pepe, Esq.
Jaburg Wilk

Micalann C. Pepe, Esq.

Spring is a time for the AADC Young Lawyers Division to give back. Each year, the YLD hosts a charity softball tournament benefitting the Valley's youth. This year, again partnered with Southwest Human Development to hold the softball tournament, complete with ballpark food and incredible raffle prizes. Though the event was scheduled for February 18, participants were thrilled we were able to move the tournament from that uncharacteristically rainy day to a much nicer day, March 25. Participants can always count on a wonderful day filled with camaraderie and charitable giving, and this year was no exception. Attorneys, legal professionals, sponsors, friends, and family all came out to play ball for a worthy cause.

Southwest Human Development has been a gracious and appreciative partner for our annual tournament, and we could not be prouder to contribute to the outstanding services they provide to young children and their families. Southwest Human Development primarily serves children from birth to age five in:

- Child Development and Mental Health
- Easterseals Disabilities Services
- Early Literacy
- Head Start and Early Head Start
- Child Welfare
- Professional Development and Training.

To learn more about Southwest Human Development and how you can help, please visit www.swhd.org.

Our Young Lawyer Spring CLE takes place on April 27, at Gust Rosenfeld. This year, rather than present three separate topics, the three-hour CLE program covers the beginning stages of trial preparation and trial for young attorneys. How can a young attorney best assist with preparing for trial? What tasks fall to a young attorney in preparing for trial? How can a young attorney help with jury selection? The trial preparation and beginning stages of trial program will be complemented by a corresponding "next stages of trial" program in the Fall. Please contact me directly at mcp@jaburgwilk.com if you have any questions, would like to attend our next CLE, or are interested in presenting at an upcoming CLE.

Upcoming events include a young professionals' networking event and executive board elections. If you are interested in networking and collaborating with motivated, like-minded young attorneys (and other young professionals) please consider joining the AADC YLD. If you would like additional information regarding happy hours, networking events, CLE events, or joining the AADC YLD executive board, please contact me. I look forward to continuing to connect with all of you!

Micalann C. Pepe
YLD President

Arizona Association of Defense Counsel
THE CIVIL DEFENSE BAR

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The Arizona Association of Defense Counsel (AADC) and Lewis Roca Rothgerber & Christie LLP invite you and your guest to participate in the:

AADC 22nd Annual Barry Fish Memorial Golf Tournament

Friday, May 5th, 2017

Whirlwind Golf Club at Wildhorse Pass
5692 W. North Loop Rd.
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6:30AM - 7:30AM - Golfer Check-In
7:30AM - Shotgun Start, 12:30PM Lunch

For more information please contact:
Debbie Hanson Tripp
admin@azadc.com / 480-609-3999
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Proceeds to benefit
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Individual & Sponsor Golf Registration Form

To register online go to www.azadc.org

Name:_____

Firm: _____

Address:_____

City:_____ St.:_____ Zip:_____

Phone #_____Email:_____

Foursome Players or Individual Names:

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PLAYER REGISTRATION & SPONSORSHIP

___ $2,500 - Greens fee sponsor (4 golfers)
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___ $1,000 - Awards luncheon (4 golfers)
___ $1,000 - Hole in One Sponsor (4 golfers)
___ $1,500 - ~~Margarita Sponsor~~ **SOLD**
___ $1,000 - Corporate Sponsorship (4 golfers)
___ $ 600 - Team registration (4 golfers)
___ $ 150 - Individual golfer
_____Total

SPONSORSHIPS (DOES NOT INCLUDE GOLF)

___ $500 - Continental Breakfast sponsor
___ $500 - Beverage sponsor
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___ $300 - Closest to the pin sponsor (4)
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___ $250 - Hole sponsor
_____Total
_____Total Player Registration & Sponsorships

We are unable to participate as a sponsor, but please accept our tax deductible corporate gift of
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Please mail check and this registration form to :
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(Cut along dotted line and mail with your check, to the AADC address at the bottom of the registration form.)

Sponsorship Opportunities

☐ **Corporate Sponsor - $1,000** ◆Company name on the sponsor board, printed in event program & displayed at designated hole ◆Complimentary golf in the tournament for up to 4 golfers including sponsor gift ◆Rolling banner ad on every golf cart

☐ **Greens Fees Underwriting Sponsor- $2,500** ◆Company name recognition on promotional materials/signs ◆Complimentary golf in the tournament for up to 4 golfers including sponsor gift **(1 of 2 Available)**

☐ **Shirt Sponsor - $2,500** ◆Company name recognition on promotional materials/signs ◆Complimentary golf in the tournament for up to 4 golfers including sponsor gift ◆Company logo on shirts given to golfers

☐ **Awards Luncheon - $1,000** ◆Company name recognition on promotional materials/signs ◆Complimentary golf in the tournament for up to 4 golfers, including sponsor gift

☐ **Hole in One Sponsor - $1,000** ◆Hole in one prizes on all par 3 holes ◆Company name recognition on promotional materials/signs ◆Complimentary golf in the tournament for up to 4 golfers including sponsor gift

☐ ~~**Margarita Sponsor - SOLD $1,500**~~ ◆Margaritas for all the golfers at the hole ◆Company name recognition on promotional materials/signs ◆Table on the 5th hole for display & distribution of company materials ◆Sponsor listing in event program

☐ **Continental Breakfast Sponsor - $500** ◆Company name on a sign at bagel & coffee booth ◆Sponsor listing in event program ◆Mention at awards banquet ◆Rolling banner ad on every golf cart

☐ **Beverage Sponsor - $500** ◆Company name on beverage tickets given to golfers ◆Sponsor listing in event program ◆Mention at awards banquet ◆Rolling banner ad on every golf cart

☐ **Cigar Sponsor - $500** ◆Table with company display and materials for distribution at hole with cigar roller ◆Company name recognition on promotional materials/signs ◆Sponsor listing in event program ◆Mention at awards banquet ◆Rolling banner ad on every golf cart

☐ **Closest to the Pin Sponsor - $300** ◆Company name on hole sponsor sign ◆Sponsor listing in event program ◆Mention at awards banquet **(4 Available)**

☐ **Longest Drive Sponsor - $300** ◆Company name on a hole sponsor sign ◆Sponsor listing in event program ◆Mention at awards banquet **(1 Available)**

☐ **Hole Sponsor - $250** ◆Company name on a hole sponsor sign ◆Opportunity to host a table at an assigned hole ◆Sponsor listing in event program ◆Mention at awards banquet

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Golf Registration

☐ **Individual Registration - $150** ◆Greens fees ◆Range balls ◆Cart ◆Golf shirt ◆Lunch

☐ **Team Registration - $600** ◆Greens fees ◆Range balls ◆Cart ◆Golf shirt ◆Lunch

☐ **Auction & Awards Luncheon - $20** ◆Lunch at Awards Luncheon

The AADC . . . fighting ALS

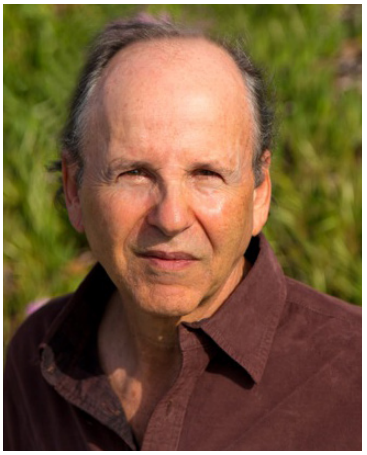
The Arizona Association of Defense Counsel (AADC) is a nonprofit organization comprised of defense attorneys who practice primarily in the area of civil defense litigation. Annually, the AADC has organized the Barry Fish Memorial Golf Tournament to raise money to fight Amyotrophic Lateral Sclerosis (ALS), also known as Lou Gehrig's Disease.

Barry Fish was a colleague of AADC and a victim of ALS. Since there is no cure for ALS, money raised from the golf tournament will help fight the disease, in memory of Barry, our colleague and friend. All tournament proceeds will benefit The ALS Association Arizona Chapter.

The ALS Association is the only not-for-profit health organization dedicated solely to the fight against ALS through research, patient and community services, public education, and advocacy — in providing help and hope to those facing the disease in the community.

DOG BITES AND PET RELATED INJURIES: Keeping your dog bite case on a short leash

By Ron Berman
Expert Witness and Consultant



Ron Berman

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 showing 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 Insurance has stated that one third of all homeowners liability pay outs in 2014 were for dog bites and although actual claims decreased by 4.7 percent the average cost per claim was up by 15%. Plaintiff demands for $1,000,000.00 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. Without sufficient knowledge needed to fully understand important connections, patterns and subtleties in the fact pattern of their case, which often lay several layers beneath the surface, this can be hard to do. Add to that potentially missed discovery opportunities and defense errors by either not using an expert, choosing the wrong expert and/or not fully utilizing the expert they have. 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 present a whole host of other difficulties for an attorney without the level of understanding needed to give their defense the foundation it deserves.

This article attempts to shed light on specific issues commonly encountered by defense attorneys and insurance adjusters in dog bite and pet related injury cases. Although, not by any means complete, important information is offered that can be used as a guide, when appropriate, to insure that as much relevant evidence can be produced and accurately utilized, in defense of your case, as possible.

It is well known that even eyewitness accounts of the very same incident are often inconsistent and that dog bites can happen in the "blink of an eye." Plaintiffs and defendants are not always clear about how the incident happened or why. Even when they seem to be clear, their descriptions of what happened are not always supported by the evidence, at least on the surface. Defendants, 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. 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 they may have displayed just prior to the bite. Plaintiffs also sometimes over-dramatize 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 their knees trying to kiss a dog he or she didn't know, to change their account of

the incident and testify that they were standing up and the dog jumped up and bit them for no apparent reason. Statements that the dog shook the victim, a factor in predatory aggression, are often not consistent 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. 3) Dogs do not lie or change their behavior because they are involved in litigation.* Typically a dogs behavior can change due to old age, illness or injury or if they have been trained or had their 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 or other breed commonly called a "pit bull" that their case is in the bag. However, this is 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 it's breed as only one factor out of many that may be important. A forensic investigation and evaluation can offer a jury a very different picture of your client's dog than the one the opposing attorney will try to paint. If opposing council has not done their homework, their attempt to lean on the dog's breed as an "ace in the hole," they may be surprised at the juries response. "Pit bulls" are no longer a dog for inner city neighborhoods and gang members as they once were. 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 meet just as much resistance as it does 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

Certain breeds see males become much more aggressive between 1-3 years of age. Also, older dogs often 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 typically meet with strong resistance from the defense. A recent serious injury case went up in smoke when the victim testified about how her neighbors 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 which one was the aggressor can be important. Sometimes, even though the defendant's dog is the larger dog, they can have the most benign temperament and no previous aggression in their history.

Dog Bites and Pet Related Injuries *(continued)*

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 their 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 their own expert and demands production of the dog for their own 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 circumstance, 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 a 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 he or she 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 their 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 the opposing attorney is hanging their hat on, may not be as valuable as they think due to the fact that the dog was provoked in a defensive manner. 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 done by your expert as investigators typically do not have the knowledge needed to ask the right follow-up questions or to 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. Here is another reason to capture the dogs 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 3 times more likely to bite. (PETA.org) Typically, the victims of chained dogs are children. Also some states like California have laws against chaining a dog for more than 3 hours at a time. Again, even if a dog has been chained, it doesn't mean for a fact that it is dangerous or vicious but it does need to be explored early on.

10. Stray or rescue

Many stray dogs or rescue dogs are wonderful pets but there are a fair percentage with behavior issues which may be the reason they were on the street or put up for adoption. Previous owners sometimes don't tell the rescue organization about aggression issues because they are afraid the dog will be euthanized. Time bombs can often be found either in rescue organization or shelter records or through utilizing them to discover further evidence. It is best that this avenue be explored early in litigation as well.

11. Training

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

12. Leash

Most cities have leash laws but a lot of them also require a dog to be restrained on a leash not over 6 feet long. If your client's dog was being walked on a retractable leash that was extended over 6 feet 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 have to have voice control over their dogs. Does your client have off leash voice control over their dog? If they claim that they do, they need to prove it.

13. Exercise

Dogs that are under exercised 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, 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) which is an 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 are: 1) Are the plaintiff's wounds from a dog bite? 2) Is the defendant's dog the dog that bit the plaintiff? 3) Did the attack happen as the plaintiff describes? 4) Did the plaintiff provoke 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, 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 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 victims anatomy, and has to be pulled off the victim by the owner/handler. Plaintiff attorneys often use the word attack in their settlement demands and complaints. If the evidence does not support this claim, your expert should be able to neutralize the emotional power that such words inherently convey to a jury.

Defensive aggression

Dogs can 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 ones face very close to a strange dogs face in an attempt to kiss or hug them will often receive 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 can also 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 the victims 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, etc., Inc.* (1954) 127 Cal.App.2d 479) and walking toward a dog does not constitute provocation. (*Chandler v. Vaccaro* (1959) 167 Cal.App 2d 786.) (dogbitelaw.com)

Attack Dynamics

There are often reasonable explanations why a particular wound pattern does not seem to add up but these answers are typically only available to attorneys 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 occasions previously (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. Certainly, the victim of the bite is not intending to threaten or hurt

Dog Bites and Pet Related Injuries *(continued)*

the dog, but nevertheless their actions can 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, they need to know how and where to find evidence that is not readily available through normal channels. Lastly, they need to know 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 come in all shapes and sizes and their 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 in which nearly all police dogs are trained and in some cases 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 to do and should never have 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. The case did settle but for a great deal less than the defense had expected to pay.

That all experts need to be carefully vetted is well known but rarely done. In cases involving dog bites and pet related injuries, it is vital to go over each and every area of the litigation that the expert might be asked about. He or she must have expert qualifications in every area. Just calling yourself a dog expert does not make you an all-purpose expert. Has the expert now offering opinions on dog bite wound evaluation been published on that topic? Unlike construction defect cases or slip and fall cases involving specific gradients...people know dogs or at least believe they do. Every juror will have had some experience with dogs at some time in their life. Many will have been bitten. More than anything they need to be educated in what they don't know and confirmed in what they do know. Most importantly, dogs are basic and real. Your expert's testimony must reflect that with their tone and language.

It is a good idea to "cross examine" your own expert before their deposition. He or she is only as good as their ability to apply their knowledge and experience to the matter at hand and then communicate their opinions, under enemy fire, in a deposition or courtroom. If they can't thoroughly convince you, they likely won't convince an adjuster or a jury.

Hopefully, the information presented here will be helpful in clarifying important issues encountered in dog bites and pet related injury cases as well as beneficial during all phases of the litigation process.

Let's Hear It For The Defense

Ninth Circuit Affirms Equitable Subrogation Award in Wrongful Death Settlement

Gina Sluga and Alison Christian of Christian Dichter & Sluga, P.C., obtained a recent victory at the Ninth Circuit Court of Appeals. The case involved an insurance dispute over coverage for a wrongful death in Arizona. The insured's employee caused a fatal car accident driving while intoxicated following a company picnic. The insured's commercial auto carrier denied coverage. The CGL insurer paid the loss and Ms. Sluga and Ms. Christian represented the insurer in an equitable subrogation action, successfully recovering the amount the auto carrier should have contributed to a settlement. The Ninth Circuit affirmed the District Court's decision, awarding Ms. Sluga and Ms. Christian's client its attorneys' fees.

Steve Bullington and Cory Tyszka Obtain Unanimous Defense Verdict in Medical Malpractice Case

Steve Bullington and Cory Tyszka of Jones, Skelton & Hochuli, PLC obtained a unanimous defense verdict for a medical malpractice case. This case involved allegations of medical malpractice arising from a penile prosthesis exchange procedure. Plaintiffs alleged that Defendant was negligent in leaving a fragment of tubing from the removed prosthesis in the Plaintiff's groin area, causing Plaintiff to suffer an infection, additional surgeries, and loss of employment. Defendant maintained that he met the standard of care in removing the prosthesis and that Plaintiff's infection was not caused by the fragment. Plaintiffs claimed $900,000 in damages due to pain and suffering, loss of consortium, lost wages, loss of enjoyment of life, medical bills, and expenses. After an eight day trial, the jury returned a unanimous defense verdict.

Robert Berk and Dillon Steadman Defense Verdict Obtained in Legal Malpractice Case

Robert Berk and Dillon Steadman of Jones, Skelton & Hochuli, PLC recently obtained a defense verdict in a legal malpractice case. The plaintiff alleged that the defending attorneys committed malpractice while representing the Plaintiff in an underlying workers compensation case. The court granted defendants' motion to split the case into a liability phase and a damage phase.

After an unsuccessful mediation, at which the plaintiff demanded $1.9 million and the defendants offered $75,000, the liability phase of the trial took place. After a 5-day trial, the jury was out less than ten minutes before returning a unanimous defense verdict on liability. As a result of the verdict, the damage trial was vacated.

Michele Molinario and Amelia Esber Obtain Dismissal of Unlawful Arrest Case

Michele Molinario and Amelia Esber of Jones, Skelton & Hochuli, PLC successfully moved for a dismissal in an unlawful arrest case against an Arizona County, and various County law enforcement officers. Prior to filing suit, the Plaintiff mailed a Notice of Claim pursuant to A.R.S. 12-821.01 to the Sheriff's Office P.O. Box, as opposed to the mailing it to the officers' home addresses or serving the officers in person. The legal question was whether service of a Notice of Claim by mail was valid at the officers' workplace.

The Superior Court Judge found that the Plaintiff did not properly serve the Notice of Claim upon the County officers in accordance with Rule 4(d), Ariz. R. Civ. P., which requires service upon an individual to be done personally, or by leaving a copy of the summons and complaint at the individual's residence. Further, service of a Notice of Claim is mandatory, and the failure to do so in the appropriate manner results in the dismissal of the claims against the County officers.

Summary Judgment Granted in Premise Liability and Fraudulent Land Transfer Case

John DiCaro and Justin Ackerman of Jones, Skelton & Hochuli, PLC obtained summary judgment on a premises liability and fraudulent transfer lawsuit filed against Gavilan Peak, LLC. On November 4, 2013, Steven Lane was seriously injured from an unidentified explosive device while assisting acquaintances move off a piece of property owned by Gavilan Peak, LLC. Unbeknownst to Gavilan Peak, the property was previously the site of explosives manufacturing and military and law enforcement training by its former owner. In 1999, federal and then state government efforts occurred to remediate the Property due to safety concerns. After the state remediation was complete, the Governor's office announced that the remediation was a success, and that "the hazardous materials are gone

and the residents are safe." During the sale of the Property, the former owner allegedly told a representative of Gavilan Peak that the property was entirely safe as a result of these remediation efforts.

Mr. Lane's lawsuit alleged that Gavilan Peak breached its duty of care because Gavilan Peak failed to warn him of the dangerous condition of the Property. Gavilan Peak argued, among other things, that given plaintiff's acquaintances undisputed knowledge that the Property was dangerous (by virtue of finding materials on the property that they knew were used to make bombs and booby traps), which they failed to inform Gavilan Peak, that Gavilan Peak's duty to Mr. Lane was released under Restatement (Second) of Torts § 358. In addition, given the utter lack of evidence regarding Mr. Lane's fraudulent transfer claim, Gavilan Peak argued it was entitled to summary judgment.

The Court agreed, adopting Galvin Peak's argument, dismissing Mr. Lane's premises liability claims under Restatement § 358 and his fraudulent transfer claims for lack of evidence. After the Court's ruling, Plaintiff's remaining claim against Gavilan Peak involving "false light invasion of privacy" was stipulated for dismissal with prejudice.

Russell Skelton and Douglas Cullins Obtain Unanimous Defense Verdict

Russell Skelton and Douglas Cullins of Jones, Skelton & Hochuli, PLC obtained a unanimous defense verdict for a medical malpractice case. This case involved allegations of medical malpractice arising from a spinal reconstruction procedure. The complex surgery was successful and completed without complication. However, Plaintiffs alleged that Defendants were negligent in failing to diagnose a post-procedure infection. Defendants maintained the infection developed in the days following Plaintiff's discharge from the hospital. Plaintiffs claimed pain and suffering, loss of consortium, lost wages and loss of enjoyment of life as well as medical bills and expenses in excess of $3,000,000. After an eight day trial, the jury returned a unanimous defense verdict.

Michael Hensley and John Lierman Obtain Summary Judgment

Michael Hensley and John Lierman of Jones, Skelton & Hochuli, PLC obtained summary judgment on all claims in Maricopa County Superior Court, for two Phoenix Police officers and a client restaurant, all of which had been sued for negligence after the plaintiff was shot in the chest by another restaurant patron. The plaintiff alleged that the restaurant and the two police officers, who were working at the restaurant as an off-duty officer detail, were negligent in allowing the plaintiff's

assailant to have a gun inside the establishment. The plaintiff argued that the restaurant's "no guns" policy, and its provision of security measures at the front entrance on the night in question, as well as an off-duty officer detail, constituted an undertaking to keep the premises free of guns, such that the presence of the gun alone was evidence of negligence.

The JSH attorneys filed a motion for summary judgment, arguing that the two off-duty police officers had no duty to the plaintiff as proprietors of land, because they were independent contractors with duties set forth in standing orders of the Phoenix Police Department, under which they were not responsible for security, but only for law enforcement. Indeed, under the Fourth Amendment, the officers could not take part in any security measures, but were strictly limited to enforcement of the law, not affirmative provision of private security measures.

The same motion for summary judgment recognized that the restaurant had a duty of care to keep customers safe, but that the evidence of patdowns of male patrons and bag searches of female patrons on the night in question was prima facie evidence of reasonable measures for security to fulfill that duty. It was further argued that the reasonableness of a restaurant security plan is an issue beyond the knowledge of the layman, and that the plaintiff had no expert opinion to explain to the jury what more a reasonable restaurant owner should have done to secure his premises. The court found that the restaurant completed all security measures it had undertaken to do, and that the plaintiff had failed to offer any competent evidence that something more should have been done. The court therefore granted summary judgment on all claims and the costs of litigation to the defendants.

Bill Caravetta Prevails on Defense of Bad Faith Claim

Bill Caravetta of Jones, Skelton & Hochuli, PLC obtained summary judgment on bad faith claim against third-party administrator. While transporting Department of Defense cargo for M3 Transportation, Plaintiffs Kenneth Ingram and Wiley Harrison's commercial truck malfunctioned. While traveling to the M3 terminal in a rental car on June 6, 2011, Plaintiffs were struck head-on by an oncoming vehicle. Both Plaintiffs sustained serious injuries. Great American Insurance Company, M3 Transport's insurer, received notice from Plaintiff that both were asserting workers' compensation claims for wage and medical benefits arising out of the accident. RTW Incorporated was retained by Great American as the third-party administrator of the claims, and on August 30, 2011, the claims adjuster recommended that the claims be denied because Plaintiffs were not in the course and scope of their employment at the time of the accident.

Plaintiffs sought review by the Industrial Commission of Arizona. The Industrial Commission determined that Plaintiffs' claims were compensable and that they were entitled to benefits. On February 22, 2013, M3 Transport filed a special action for review of the Industrial Commission's decision, which was affirmed by the Arizona Court of Appeals on December 26, 2013. Plaintiffs filed their Complaint against Great American and RTW alleging bad faith and punitive damages on grounds that there was no legal justification or reasonable basis for defendants' alleged improper denial of their workers' compensation claims. Plaintiffs claimed that RTW, the third-party administrator, was engaged in a joint venture with Great American

Let's Hear It For The Defense *(continued)*

Insurance and, therefore, RTW was liable for bad faith. Prior to oral argument on defendant RTW's motion for summary judgment, a settlement conference was held in Los Angeles, California. Plaintiffs' collective demand against RTW and Great American was $17 million. RTW refused to settle the case. Great American settle the case for an undisclosed amount.

On September 21, 2016, Judge Stephen P Logan, United States District Court Judge, entered summary judgment in RTW's favor, holding that RTW was not engaged in a joint venture with Great American.

The Court held there was no evidence that RTW advertised, marketed, sold, billed or collected premiums, received a commission on collected premiums, issued certificates of coverage, solicited the sale of Great American's policy with M3. RTW was found to have solely handled claims for Great American and there was no joint venture.

2016 Tucson Holiday Judicial Reception

On December 1, 2016, the AADC and the Tucson Defense Bar kicked off the holidays by holding its annual combined Judicial Reception at the Arizona Inn. At the event, the AADC and TDB presented Arizona Supreme Court Vice Chief Justice John Pelander with the Judicial Excellence Award. The AADC also awarded the five finalists of the University of Arizona James E. Rogers College of Law's closing argument competition with prize money. As always, members of the bench and bar enjoyed socializing at the Arizona Inn for the annual event. A good time was had by all who attended.

Vice Chief Justice John Pelander

Justice Pelander enjoyed returning home to Tucson for annual Judicial Reception. In fact, he graduated from the University of Arizona College of Law in 1976, earning a J.D. with high distinction. After a clerkship with Judge Richard H. Chambers with the U.S. Court of Appeals for the Ninth Circuit, Justice Pelander began his legal career in Tucson at the law firm of Slutes, Browning, Zlaket & Sakrison, P.C. (currently, Slutes, Sakrison and Rogers, P.C.).

Justice Pelander was appointed to the Arizona Court of Appeals, Division Two, in May 1995 where he stayed until he was appointed to the Arizona Supreme Court in September 2009.

At the Judicial Reception, Tucson Attorney Tom Slutes gave opening remarks about Justice Pelander. Justice Pelander was recognized as having made a significant impact on the Arizona legal community, particularly in Tucson where he has actively supported the Southern Arizona Legal Aide's Volunteer Legal Program. In fact, when asking Tucson legendary attorney, D. Burr Udall, for ideas as to who would be worthy to receive the AADC's 2016 Judicial Excellence Award, Justice Pelander was the first off his tongue.

Justice Pelander, whose wife and mother were in attendance, was very honored to receive the award.

University of Arizona Closing Argument Competition Award Winners

The five finalists for the University of Arizona's James E. Rogers College of Law's closing argument competition were: Matthew Ashton, Elizabeth Smiley, Mario Gonzalez, Sara Levine, and JeanPaul Barnard. At the recent Judicial Reception, these law students were awarded prize money from the AADC ranging from $250.00-$1,000.00. Of note, the top two finalists—Matthew Ashton and Elizabeth Smiley—subsequently went on to compete in the Jenckes Closing Argument Competition against law students from Arizona State University where they returned the Jenckes Cup to the University of Arizona for the seventh year in a row, much to the pleasure of those south of the Gila.

2016 Tucson Holiday Judicial Reception *(continued)*

2016 Phoenix Holiday Judicial Reception

On December 8, 2016 at the Phoenix Judicial Reception, the AADC was proud to honor Maricopa County Superior Court Judge Robert Oberbillig with the Judicial Excellence Award. The AADC recognized Judge Oberbillig with the Judicial Excellence Award for his contributions to the judiciary and legal system.

At the reception, Arizona Court of Appeals Judge Lawrence Winthrop offered warm introductory remarks about Judge Oberbillig, including memories of starting their own firm together in private practice. Judge Oberbillig was humble and grateful in his acceptance of the Award and extended to the AADC members a heartfelt gratitude for the recognition of receiving the Judicial Excellence Award.

Judge Oberbillig obtained his J.D. with highest distinction from University of Iowa 1982. Between 1982 and 1994, Judge Oberbillig practiced law at Snell & Wilmer, reaching partner status. From 1994 to 1997, he was a partner in the firm of Doyle, Winthrop, Oberbillig & West. From 1997 to 1998, he practiced at Snell & Wilmer as Of Counsel until his appointment in 1998 as a Judge of the Maricopa County Superior Court, where he has served to the present. Judge Oberbillig is currently the Presiding Southeast Judge in the Civil Department.

In addition to judicial duties, Judge Oberbillig has in the past been a member of the AADC board of directors, the board of directors of Inns of Court, past chairperson of the Maricopa County Bench/ Bar Committee, Fellow of the Arizona Bar Foundation, member of the Arizona State Board of Legal Document Preparers, and Past Chairperson of the Civil Study Committee. He is currently a member of the State Bar Civil Practice and Procedure Committee.

2016-2017 Board of Directors

Arizona Association
of Defense Counsel

950 E. Baseline Rd. #104-1025
Tempe, Arizona 85283

SAVE THE DATE!!

AADC ANNUAL MEETING - JUNE 1-2, 2017
Westin Kierland Resort & Spa, Scottsdale, AZ

A live oral argument before Division One of the Arizona Court of Appeals will be the center piece of this year's AADC annual meeting and conference. The case of *Sloan v. Farmers Insurance* will be argued to the court. This case is an insurance bad faith case in which Farmers obtained a defense verdict at trial only to have that verdict overturned by the trial court pursuant to Rule 60(C)(6) due to subsequent DPS determinations that two Phoenix Fire Department investigators had engaged in misconduct related to the investigation of Sloan who was initially charged with arson.

We have a group room block for Thursday and Friday night, for people wanting to stay at the resort. The group rate is $175 per night plus a $15 per night resort fee. To make a room reservation call 800-354-5892 (Starwood Central Reservations). Ask for the AADC Annual Meeting group rate.

To register to attend go to www.azadc.org.