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The Marin Lawyer

An Official Publication of the Marin County Bar Association

GENERAL MEMBERSHIP MEETING

TWO STEPS TO FISCAL RECOVERY IN CALIFORNIA? SENATOR MARK LENO TO SPEAK ON PRISON REFORM AND UNIVERSAL HEALTH CARE

Our state budget is in tatters. Our prisons are overcrowded. Millions of Californians have no health insurance. Is there a way out of this mess?

On **September 23, 2009,** at Four Points Sheraton Restaurant in San Rafael, State Senator Mark Leno will be keynote speaker at the September 2009 General Membership Meeting. Senator Leno will discuss SB 678, his legislative proposal for prison reform, and SB 810, his proposal to provide universal health care for every California resident.

According to Sen. Leno, SB 678 recommits California to a system of community corrections that will enhance public safety and help address prison overcrowding by redirecting state public safety resources for the purpose of developing intense and strategic community supervision over non-violent offenders.

The goal of SB 810 is to establish a modern universal health care system that provides every California resident with comprehensive benefits for life, containing the growth in health care spending and ensuring patient-centered, high quality health care for all Californians. *(Continued on page 10.)*

Calendar of Events

Sept. 23rd
General Membership Meeting
12 – 1:30 pm

Sept. 10th
Insurance Bad Faith Seminar
4 – 6 pm

Sept. 16th
Probate & Estate Planning Section Meeting
12 – 1:30 pm

Sept. 17th
Fee Arbitration Training
5:30 – 8:30 pm

Sept. 17th
Real Property Section Meeting
12 – 1:30 pm

Sept. 18th
Diversity Section Meeting

Sept. 21st
Probate & Trusts Mentor Group
12 – 1:30 pm

Look for details each month in *The Marin Lawyer*

In This Issue

Louis S. Franecke was Guest Editor of this issue of *The Marin Lawyer.* Philip R. Diamond is Series Editor for 2009.

CAN CONSUMERS HAVE EXPECTATIONS FOR SAFETY OF THE PRODUCTS THEY USE?

*By Louis S. Franecke**

In 1978, *Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 431, heralded the era of strict liability and defined the two tests for a design defect. One test was that the product was defective if it fell short of consumer safety expectations. Of course, thereafter, many courts have followed defense arguments that ordinary consumers can't possibly know what to expect in our complicated, high-technology world and, therefore, the jury instruction shouldn't be given.

In my opinion, the courts have missed the boat, *(Continued on page 10.)*

PRESIDENT'S MESSAGE

THE BEST IS YET TO COME!

By Marlene P. Getchell

We have already completed two-thirds of our MCBA year, and the best is yet to come!

MCBA's Green Star Office Program

In order to publicize our Green Star Office Program, MCBA is giving away free lunches to members who satisfy the criteria of particular levels of accomplishment. It's really easy to meet the criteria. For example, if you discourage printing emails and learn how to archive emails using Microsoft Outlook or some other program, recycle discarded office paper, cardboard and newspapers, glass, plastic and aluminum bottles and containers, MCBA will acknowledge your achievement at an MCBA General Membership Meeting and in the Marin Lawyer. Couple these achievements with doing legal research by email or by downloading the results to your computer as often as possible rather than printing the results, use double-sided copying and printing at least for drafts and internal documents, centralize acquisition and storage of forms and materials generally used by attorneys in the firm or building (e.g., Federal Express or US Postal Service boxes), and purchase office paper with at least 30% recycled content, and we will announce your achievement at the next General Membership Meeting. In addition to this, eliminate all plastic bottles from the workplace, have your toner cartridges refilled or recycled, purchase recycled envelopes and scan documents and correspondence when possible and store the information in your computer, and LUNCH IS ON MCBA at the next General Membership Meeting. To qualify, please contact Robynn Gaspar, Executive Director at rgaspar@30nsp.org.

MCBA's next step in achieving "Green" will be to see how many of our members would prefer to receive this Newsletter by email instead of through the mail.

Come and Hear Senator Mark Leno

In keeping with the great job that MCBA's Program Chair Matt White has done in lining up guest speakers for the General Membership Meetings, Matt has scheduled Senator Leno to speak to us on September 23. This has been a great year for speakers at our General Membership Meetings, including dignitaries Assemblyman Jared Huffman, Marin County Supervisor Charles McGlashan and California Supreme Court Justice Carlos Moreno. Senator Leno is our representative from the Third Senate District, which includes Marin, and portions of San Francisco and Sonoma Counties. Senator Leno is an environmentalist, having earned a 100% lifetime voting record with the Sierra Club, Friends of the Earth and the California League of Conservation Voters. He has been honored for his environmental achievements by San Francisco Baykeeper, Friends of the Earth and Vote Solar. Most recently, Senator Leno was instrumental in the state Joint Legislative Audit Committee's vote to investigate the family courts in Marin and Sacramento counties.

Golfing for the Dogs

For those who love golf and dogs, on October 2, MCBA will be hosting its Third Annual Gold Tournament to benefit Guide dogs for the Blind, this year at Peacock Gap Golf Course, 333 Biscayne Drive in San Rafael. Puppies will be in attendance! MCBA Directors Louis Franecke and Phil Diamond who are organizing this event have arranged for participants to have two chances for big prizes: "$1,000,000 Hole in One Challenge" (sponsored by Tamalpais Bank), and "Hole in One and win a 2010 Toyota Prius" (sponsored by Toyota Marin). Golfers of all abilities are welcome!

Have Lunch with Your Favorite Judge

Our annual Judges Luncheon is scheduled for October 28. This is one of MCBA's best-attended General Membership meetings. We look forward to hearing from

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RESERVATION FORM General Membership Meeting **Speaker:** Mark Leno

Please make ____ reservations for me at Four Points Sheraton, 1010 Northgate Drive, San Rafael on **Wednesday September 23, 2009**, from 12-1:30 pm.

Please choose one: ___ Chicken Caesar Salad ___Italian Sausage Lasagna ___Vegetarian Penne Pasta

Name(s) or Firm Name:_____ Phone:_____

❑ Enclosed check for _____$25 members and $35 non-members. Walk-ins $5 more.

❑ Visa ❑ Mastercard _____ Exp _____

Please, we must have RSVP's by Sept. 16, 2009.

Make checks payable to MCBA and mail to: MCBA, 30 North San Pedro Road, Ste. 140, San Rafael 94903.

Reservations are non-refundable unless the individual provides at least 24 hours cancellation notice to MCBA.

GOING GREEN

By Kate Rockas

10 Ways to *Green* Your Office:

1. Recycle paper, bottle and cans. Have separate bins in the office for recycling. If your office building does not recycle, try creating a weekly schedule for sharing the work of taking a recycling bin home each week.

2. Use compact fluorescent or LED lights throughout the office. Compact fluorescents use ¼ of the energy and last up to ten times longer than standard lights. In addition to the energy saved, think of the money saved using compact fluorescent and LED lights!

3. Use lighting motion sensors for offices, conference rooms and bathrooms. There is no reason for lights to be on when there is no one in the room.

4. Turn off your printers, faxes and computers when you leave at night. Many people are under the false impression that it's more efficient to leave computers on over night. This isn't true – you should shut off all electronics when you leave the office.

5. If possible, use laptop computers rather than desktop computers. Energy Star laptops use up to 90% less energy than standard desktop computers.

6. Stop the bottled water habit. Americans throw away over 35 *billion* water bottles every year. If there are a lot of bottled water drinkers in your office, consider signing up for a water delivery service or buying a Brita filter and drinking tap water.

7. Use email. Rather than using paper to mail something (and/or to fax it), email it instead. You will also save money on paper and postage.

8. Use recycled office paper and other office products. Most paper office products, such as copy paper, envelopes, folders, note pads, and post-it notes, are available in a recycled version. Print your business cards and letterhead with green printing companies using soy based inks.

9. Stop junk mail. Take the time to stop junk mail. Visit company websites and request that you be unsubscribed from their mailings.

10. Don't drive to work. Instead of driving to work, work from the comfort of your home. Or, consider taking public transportation.

WHAT EVERY BUSINESS LAWYER NEEDS TO KNOW ABOUT CALIFORNIA EMPLOYEE NON-COMPETE AND NON-SOLICITATION AGREEMENTS

*By Steven Kesten, Esq.**

While speaking to an auditorium filled with hopeful high school students, President Obama recently observed that we are an information based economy. Going forward, said the President, it is the companies and the individuals who possess information vital to modern business that will thrive and survive. To those of us living in the Bay Area, the President's words come as no surprise. As lawyers, we are often called upon to help our clients retain and protect their trade secrets and other vital information that provides them with a competitive advantage in the local and global marketplace. We are also living in an increasingly mobile society. When employees leave their employment, as they frequently do, they walk out the door with a head full of your client's trade secrets and other information vital to the ongoing success of the business. A vital question which naturally arises is: How do you protect your client?

If you've been confused about how to properly counsel your business client with regard to this important matter, there is little wonder why. Until 2008 the California Court of Appeals and the Ninth Circuit were not exactly in sync about whether or not a departing employee can directly compete with the business they are leaving. Whether or not a departing employee could be restrained from soliciting customers or clients and to what degree seemed like a question that had been resolved, but not really. Beginning nearly 140 years ago, the Civil Code contained a statute rendering void any contract that restrained an individual from engaging in any lawful profession, trade or business. The language of the old statute was guided by fundamental public policy that it is better for the overall economy to allow a departing employee to work or start a business. This public policy is now expressed in Business & Professions Code § 16600.

Departing employees often start competing businesses and these new enterprises create jobs which, in turn, fuel the California economy. If nothing else, we can't have the unemployment rolls filled with people who are ready, willing and able to work and would gladly engage in productive activities but for a contract clause prohibiting their employment. As a friend and colleague recently commented, California hasn't grown to be the fourth largest economy in the world by preventing its citizens from engaging in gainful employment. The language of the statute and the philosophy behind the public policy seem clear but, as we know, sometimes there are exceptions to the rule, at least for a while.

Several Ninth Circuit cases including *Campbell v. Trustees of Leland Stanford Jr. University Campbell* (9th Cir. 1987) 817 F.2d 499, held that "narrow restraint exceptions" to the rule against non-compete agreements were acceptable. These cases left lawyers and clients pondering such questions as whether a non-compete provision in an employment or severance agreement was narrowly tailored enough to qualify as a "narrow restraint exception." Was the prohibition applicable to a small enough geographic area, we would ask? Would a non-compete agreement limited to a particular industry or sub-set of an industry be sufficiently limited in scope to qualify? The answers weren't clear until late in 2008.

In *Edwards vs. Arthur Andersen LLP* (2008) 44 Cal. 4th 937, the California Supreme Court finally provided a definitive answer and your employer clients probably won't like it. The *Edwards* decision isn't really new news. In fact, in *Chamberlain v. Augustine* (1916) 172 Cal. 289,

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TACKLING POST-SETTLEMENT TAX ISSUES

SOME BASICS YOU NEED TO KNOW

*By Robert W. Wood**

Many trial lawyers cringe when discussing taxes, and they are not alone. But understanding some tax basics related to settlement is important. Often, a small change in a settlement agreement can make a big difference in the size of the tax bite you or your clients face.

The settlement agreement itself can have a big impact on how taxes are handled. What tax provisions should you ask for? Litigation recoveries – whether from settlement or judgment – take their tax character from the origin and nature of the claim. Ask for tax language in the settlement agreement that is consistent with your theory of the case. This can help secure – or even improve – your client's tax result.

One critical statutory exclusion confuses many trial lawyers. Section 104 of the Internal Revenue Code excludes from taxation recoveries for personal physical injuries or personal physical sickness. In 1996, Congress amended §104 to limit the tax exclusion to damages arising from *physical* injuries or *physical* sickness (it previously just said "personal"). Although this statutory change is now 13 years old, there are no regulations explaining what "physical" means. To be excludable, the IRS says a recovery must be for physical injuries you can see, such as broken bones or bruises. But if you have a legitimate physical injury or physical sickness, emotional distress damages flowing *from* that injury or sickness are also excludable. In contrast, emotional distress damages outside the context of physical injuries or sickness are taxable.

I believe explicit tax language belongs in virtually every settlement agreement in every kind of litigation. Yet arguably the *greatest* need for clarity in tax language comes in employment litigation. The IRS has an incentive to view all payments in this context as wages, and employees often regard their settlements as either non-wage income, or even as excludable recoveries. Because there are very serious penalties imposed on an employer who fails to withhold on wages, there's also a big reason for the defendant in such cases to be very clear. It serves no one to have a dispute about the appropriateness of withholding and reporting after the settlement agreement is signed.

In general, therefore, it's appropriate for the settlement agreement to specifically set forth: (1) what amount of money will be treated by the parties as wages subject to withholding and a Form W-2; (2) what portion will be

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MARIN COUNTY JURY VERDICTS

By Steven Perl

The Marin Lawyer will periodically report on jury verdicts from the Marin County Superior Court. We welcome reports from trial attorneys involved in Marin County verdicts; please contact Steven Perl (SPerl@co.marin.ca.us) with your information.

Posedel v. Delong

Plaintiff: Karena Posedel

Defendant: Ji Young Delong

Case Number: CV 073217

Insurance Carrier: Allstate

Plaintiff Attorney: Richard H. Carlson, Anthony & Carlson, (510) 835-8400

Defendant Attorney: Roxanna Pezzy, Law Offices of Brian Har, (415) 281-7112

Plaintiff Doctors: Kaiser San Rafael: Drs. Aaron Lewis, neurologist & Wendy Shearn, internal medicine specializing in headaches.

Defendant Doctor: Dr. Soong, neurologist, San Francisco.

Plaintiff Expert: Richard Stuart, Pleasanton, accident reconstructionist

Defendant Expert: Ted Kobayashi, Livermore, accident reconstructionist

Judge: Hon. Andrew Sweet

Date/Location of Incident: May 07, Miller & Evergreen, Mill Valley, CA (in front Whole Foods)

Type of Action/Facts: Defendant making left turn and hit pedestrian, who claimed was in crosswalk.

Plaintiff Age: 34;

Occupation: Counselor, San Rafael High School;

Residence: San Francisco

Plaintiff's Contentions as to Liability: Hit in crosswalk with right of way.

Defendant's Contentions as to Liability: Plaintiff out of crosswalk.

Length of Jury Trial: 2+ weeks

Jury Deliberated: 3 truncated days

Plaintiff Attorney asked the Jury to Award: $2 million

Defendant Attorney asked the Jury to Award: $30,000

Injuries/Damages: Plaintiff claimed various soft tissue injuries and both traumatically induced migraines and cognitive difficulties regarding mathematic calculations & short term memory.

Plaintiff Doctor/Expert Stated: traumatic migraines; traumatic cognitive injury with short term memory loss & math calculation difficulties.

Defendant Doctor/Expert Stated: Nothing wrong with plaintiff; plaintiff lying.

Residuals: Plaintiff claimed problems continue.

Specials/Damages: Approximately $60,000, including $34,000 Kaiser lien.

Settlement Talks: Demand: $2,000,000+ Offer: $30,000

Result: Net verdict for plaintiff of approximately $175,000, after reduction of damages award for 37.5% contributory negligence of plaintiff.

Poll Result: 12-0 **Verdict Date:** 5/18/09

ASSOCIATE JUSTICE CARLOS MORENO ADDRESSES THE GENERAL MEETING OF THE MARIN COUNTY BAR ASSOCIATION

By Louis S. Franecke

On August 26, 2009, Associate Justice Carlos Moreno of the California Supreme Court addressed the general luncheon meeting of the Association.

Justice Moreno is the 111th appointment to the California Supreme Court, by appointment of Governor Davis. He previously had been a justice in the United States District Court, Central District of California, per appointment by President Bill Clinton, and a judge in Los Angeles Superior Court pursuant to appointment by Governor Pete Wilson. Justice Moreno's earliest appointment to the Compton Municipal Court was by Governor Deukmejian.

In keeping with his lone dissent against upholding Proposition 8, Justice Moreno's topics were the importance of diversity on the bench, the role of dissent in shaping the law, and a commentary on Supreme Court Associate Justice Sotomayor's confirmation process.

Justice Moreno's opinion is that dissent on the bench is essential to the shaping of the law to ensure discussion and balance for the future. Decisions today may or may not stand the test of time. The decisions today may reflect current thinking, but dissent points out another point of view and carries a message for the future.

Justice Moreno mentioned the *Karamatsu* case, dealing with internment of Japanese American citizens during World War II. He said that it was only in the dissent that the issue of racism was raised as an objection to such actions even though in a time of war.

Justice Moreno was also quick to point out that in the process of the California Supreme Court decision-making, there are numerous steps and attempts to reach consensus before an actual dissent occurs. There is a lot of give and take. Even the threat of the dissent against the majority is helpful in testing the majority's reasoning and logic in the back-and-forth discussions. He said there has to be a high threshold before a dissenting opinion is issued, but the process can get the majority thinking and may become the majority opinion years later.

On the subject of diversity on the bench, Justice Moreno believes in the importance of public perception of justice in the judiciary to all Americans. He believes that diversity on the bench enhances credibility and projects greater trust and confidence in the judiciary which is empowered to protect the public at large. The public must trust that all people are treated fairly before the bench and are not subject to prejudice.

Justice Moreno and MCBA President Marlene Getchell

As emphasized later in his talk, Justice Moreno also believes that diversity is second to the judge's oath of fairness and following the law.

Before taking questions, Justice Moreno commented on the recent 111th appointment to the United States Supreme Court in Justice Sotomayor. He opined that Justice Sotomayor's comment prior to the confirmation hearings that a wise Latino woman could make a wiser decision than a white male, while a lightning rod for criticism, should be taken in context. It is his opinion that it is not just one wise Latino woman that is the criteria, but the collective society such as on a 12-person jury or a panel of justices bringing

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MEET YOUR DIRECTORS
SPOTLIGHT ON PHILIP SNELL

The Marin Lawyer decided that it would be a good idea to let the MCBA membership get to know a little more about the MCBA Directors whom they elected, and who give so much to make the MCBA a great, vibrant, organization. To that end, *The Marin Lawyer* ran a series of articles, each focusing on a different MCBA Director or Officer. This month, our spotlight is on former MCBA Director Philip Snell.

The Marin Lawyer: What is your practice area?

Philip Snell: I am a partner of Fish & Snell, P.C., which my partner, Michael Fish, and I established January 1, 1991. We've been located on Bel Marin Keys Blvd., Novato, since then. Our firm divides its practice. Michael practices family law, estate planning, and business transactions. I engage exclusively in personal injury-plaintiff's claims.

TML: Do you have a niche?

PS: I've been representing plaintiffs in personal injury claims exclusively since 1985. I became an associate of Leonard Shaw, the consummate plaintiff's attorney, in 1985, and learned from him the skills to perfect every aspect of these cases.

TML: Why did you decide to become a lawyer?

PS: Becoming a lawyer was a natural progression from my education at St. Ignatius High School. We were given a solid education and the building blocks for the practice—English literature and composition, geometry, ethics, and we even studied Cicero in Latin. This foundation pretty much led right up to studying law. There wasn't much of a decision after that.

TML: Why do you live in Marin?

PS: I became the law clerk at Freitas, Allen, McCarthy, Bettini & McMahon on Fifth Avenue in San Rafael during my last two years of law school, and commuted here from the City. From that exposure to the practice of law by those extraordinary attorneys, and having developed familiarity with the Marin County courts in that time, I felt comfortable leaving San Francisco to live here, and began practicing law. The other mainstays for living in Marin are conspicuously the recreational opportunities given the bay, the Golden Gate National Recreation Area, Mt. Tam, and the ocean. But for the superior waves in San Francisco, there is no better place.

TML: What do you love to do when you're not busy practicing law?

PS: Growing up on Sloat Blvd. in San Francisco, I had Ocean Beach and Harding Golf Course as my backyard. I still can't get enough of surfing, and if there are no waves I'll probably play golf. Like Brian Wilson wrote, "Will I dig the same things that turned me on as a kid?" The answer is yes.

TML: Tell us about your family.

PS: My wife, Ellen, is the trademark administrator for Charles Schwab, San Francisco. Our sons Jeffrey and Jason when through St. Anselm's School and St. Ignatius College Prep. Jeff graduated from Virginia Tech and was commissioned as an officer in the Marine Corps. He is now stationed in Pensacola, Florida, learning to fly helicopters in the Marines. Jason is a junior at the University of Kansas, and is a journalism major.

TML: If you could pursue any other career besides law, what would it be and why?

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ONLINE TENTATIVE RULINGS IN FAMILY LAW CASES

Tentative Rulings in Family Law are now available on line at the Marin County Superior Court website. If you do not have access to a computer, free computer use is available at all Marin County Public Libraries, the Marin County Law Library (10 North San Pedro, San Rafael), and the Legal Self Help Services located in Room 244 of the Marin County Civic Center.

What is a Tentative Ruling? Prior to hearing a motion or order to show cause filed by a party seeking specific court orders, the judicial officer who has reviewed the documents filed by each party issues a tentative ruling on each of the issues raised by the parties. The Tentative Ruling is available as of 2 p.m. on the day before the court hearing.

2009 NOMINATING COMMITTEE

The 2009 Nominating Committee was established pursuant to the Marin County Bar Association by-laws. The members of the committee are: Eric Sternberger, Lou Franecke, Wanden Treanor, Dave Feingold, Ed Rockman, Renee Giacomini Brewer, and President-Elect Beth Jordan, who chairs the committee.

The Nominating Committee will make its report at the General Membership Meeting on September 23, 2009. At any time before October 1, 2009, any active member who was not nominated, and who meets the required qualifications, may be nominated for any office by nomination in writing, signed by at least ten (10) active MCBA members and presented to the MCBA Secretary. The final slate will be published in the October newsletter and on the MCBA website.

ALL GOLFERS
(AND FRIENDS OF GOLFERS)
SAVE THE DATE!!

WHAT: THIRD ANNUAL MCBA GOLF TOURNAMENT (AND BENEFIT FOR GUIDE DOGS FOR THE BLIND)

WHEN: **FRIDAY, OCTOBER 2, 2009**

WHERE: PEACOCK GAP GOLF COURSE (SAN RAFAEL)

FORMAT: SCRAMBLE (SO THAT GOLFERS OF ALL LEVELS MAY PARTICIPATE AND HAVE A GREAT TIME!)

FOR FURTHER INFORMATION,
CONTACT LOUIS FRANECKE
PHONE (415) 457-7040)
OR EMAIL (louis.franecke@gte.net).

MARK YOUR CALENDAR! SECOND ANNUAL MCBA CLE FAIR SATURDAY, NOVEMBER 14, 2009

The Marin County Bar Association and the Marin County Women Lawyers will be presenting the Second Annual CLE Fair on Saturday, November 14, 2009, at the Four Points Sheraton in San Rafael, from 8:00 am to 2:30 pm. Breakfast and lunch will be included. This is an excellent opportunity to get 5 hours of CLE credits at once, including Ethics, Substance Abuse, and Elimination of Bias, in a convenient San Rafael location, with your friends and colleagues from Marin County, including a breakfast and catered lunch. There will be a luncheon panel with Judge Faye D'Opal, Judge Terrence R. Boren, and Commissioner Beverly K. Wood which is sure to include invaluable information and insights from the bench. The MCBA and MCWL are putting together an impressive group of speakers on a range of topics including family law, estate planning, and e-discovery. The event is organized into three one-hour morning sessions (choice of four seminars each hour), followed by a special luncheon program. Sign up details and early-bird discount sign-ups will be announced in the October issue of The Marin Lawyer and via email to Marin County Bar Association members. In the meantime, mark your calendar and plan on taking advantage of this great opportunity to attend some informative seminars and get the CLE credits you need.

(General Membership Meeting, continued from page 1.)

Elected to the Senate in 2008, Senator Mark Leno represents the 3rd District, which includes Marin, and portions of San Francisco and Sonoma Counties. He is the first openly gay man elected to the State Senate, and one of the first two openly gay men ever elected to the Assembly. Prior to his election to the Senate, he served six years in the State Assembly and four and a half years on the San Francisco Board of Supervisors.

A native of Wisconsin, Leno attended the University of Colorado at Boulder, then went on to become valedictorian of his graduating class at the American College of Jerusalem, where he earned his Bachelor of Arts Degree. Leno also spent two years in Rabbinical Studies at The Hebrew Union College in New York.

Seating is limited; early reservations are recommended. Please register for this exciting program by completing and returning the reservation form on page 2, or by calling or e-mailing Robynn Gaspar at (415) 499-1314 or rgaspar@30nsp.org.

(Consumer Expectations, continued from page 1.)

as explained below, in understanding the difference between a technological explanation as to "why" something failed versus the "effect" of what it did when it failed. In other words, you don't have to know how a computer works to expect that it will turn on when you push the button.

The Everyday Example of a Seat Belt

Today's drivers are required to use seat belts, not only on themselves but even their small children. The seat belts are, with some variations, basically a web strapping ending in a tongue and latch mechanism released by pushing on a button. All consumer drivers latch and unlatch their seat belt numerous times a day getting in and out of their vehicles. However, a seat belt is useless unless there is a collision where it is expected to keep you in your seat until the car stops. Of course, you expect you then can release it and get out. Maybe not.

The law is clear that **expert testimony may be admitted to assist the jury** to understand what is reasonable to be expected in a design to aid the jury in determining what it would reasonably expect as a consumer. *See, Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 567; *Jones v. John Crane, Inc.* (2005) 132 Cal.App.4th 990, 1003.

Normal relief pressure on the seat belt release latch is 3.5 pounds of force. The Federal Motor Vehicle Safety Standards require that, after a seat belt is subjected to 3,000 pounds of pull, only a small force should be needed to press the latch button and release the seat belt in absence of deformation. Most jurors and lay people would know this only through evidence at trial.

A reasonable jury can easily "infer" that if a seat belt fails to release when the latch button is pressed, it does not meet a consumer's expectation. *Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 548. "A jury is entitled to accept persuasive circumstantial evidence even where contradicted by direct testimony." *Hasson, supra,* 19 Cal.3d at 548. Further, an instruction may be justified where the jury could reasonably infer the facts in question: "All reasonable inferences in support of opposed instructions will be drawn." *Id.* Other cases have clearly stated that evidence necessary to justify the giving of an instruction need not preponderate on the issues involved. Even slight or contradicted evidence may be sufficient for this purpose. *Bernal v. Richard Wolf Medical Instrument Corp.* (1990) 221 Cal.App.3d 1326, 1338.

There is nothing more simple than the simple act of pushing a button and expecting a particular result. Yet, as explained below, trial courts may not instruct on the consumer expectation test because even a seat belt is "too complicated."

Why are Courts Refusing to Instruct Juries on the Consumer Expectation Test?

First and foremost, a consumer expectation test is communicated to the jury through both jury instructions and argument of counsel. If the consumer expectation test jury instruction is not given, counsel cannot argue any of the facts, circumstances and conclusions associated with a reasonable evaluation of the consumer expectation test. Yet, courts are continuously bamboozled by the defense arguing that everything is too complicated and that the average consumer has no idea what happens in a crash, so how can they have an expectation?

However, the purposes of jury instructions are to give not just what conclusions the court might think the jury may get to, but to give the jury the tools to analyze all of the competing evidence and testimony (including arguments) presented to it for deliberation. Failure to give a jury instruction may be grounds for new trial if prejudicial to the moving party's right to a fair trial – *i.e.,* failure to instruct on a theory of the case supported by substantial evidence. *See*, *Soule,* 8 Cal.4th at 580. Failure to instruct may also be grounds for a new trial under Cal. Civ. Proc. § 657(7) (*i.e.,* error in law). "In charging the jury, the court must state to them all matters of law which it thinks necessary

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(Consumer Expectations, continued from page 1.)
for their information in giving their verdict." Cal. Code of Civ. Proc. § 608. A party has a right to instruction on his theory of the case, if it is reasonable and finds support in the pleadings and evidence or an inference may be properly drawn from the evidence. Numerous cases support this statement. See, *Dawkins v. Los Angeles* (1978) 22 Cal.3d 126, 134.

The parties are entitled to have the jury instructed on every theory advanced by them that finds support in the evidence. *Soule, supra,* 8 Cal.4th at 572; *Mayes v. Bryan* (2006) 139 Cal.App.4th 1075, 1091. The plaintiffs are entitled to instruction on applicable law supported by pleadings or evidence whether or not the trial court thought the evidence persuasive. *Vine v. Bear Valley Ski Co.* (2004) 118 Cal.App.4th 577, 594. Refusal to give a requested instruction is **reversible error where the omission misleads and confuses the jury** and it is reasonably probable a result more favorable to the requesting party would have been reached in the absence of error. *Byrum v. Brand* (1990) 219 Cal.App.3d 926, 939.

If there are any facts from which a reasonable jury can infer that a particular product did not perform as would reasonably be expected by the product user (as well as maybe explained to them by expert testimony), the court is required to give a jury instruction regarding that theory of the law. The evidence relied upon to support a jury instruction need not be direct. "The jury is entitled to accept persuasive circumstantial evidence even where contradicted by direct testimony." *Hasson, supra,* 19 Cal.3d at 548. Further, an instruction may be justified where the jury could reasonably infer the facts in question: "All reasonable inferences in support of the proposed instruction will be drawn." (*Id*.)

Finally, the evidence necessary to justify the giving of an instruction need not preponderate on the issue involved. Even slight or contradicted evidence may be sufficient for this purpose. *See, Bernal v. Richard Wolf Medical Instrument Corp., supra,* 221 Cal.App.3d at 1338. The court may not refuse to instruct on a particular legal theory because the supporting evidence fails to "inspire belief" or is "slight" as compared to other, conflicting evidence. *See, Phillips v. G.L. Truman Excavation Co.* (1961) 55 Cal.2d 801, 808.

What Does a Consumer Know, and What Does a Consumer Expect?

Soule v. General Motors Corp., *supra,* 8 Cal.4th 548, laid down the limits of the consumer expectation test. *Soule* involved an automobile head-on collision where the car frame buckled, crushing the driver's ankles. The question was whether a defect existed such that the driver's injuries were enhanced. The California Supreme Court unanimously held that the "consumer expectations" test is "reserved for cases in which the **everyday experience** of the **product's users** permits a conclusion that the product's design violated **minimum** safety assumptions and is thus defective **regardless of expert opinion about the merits of the design."** 8 Cal.4th at 567. The converse also is true: the consumer expectations test does not apply when the degree of safety a product should exhibit under particular circumstances is a matter **beyond the common experience** and understanding of its **ordinary users**." *Id*. at 568 n.5 (emphasis added). Thus, the alleged touchstone for application of the test is an "ordinary user's" "everyday experience" with the product in the "circumstances" at issue; where "the question of how safely the product should have performed cannot be answered by the common experience of its users," in those "circumstances" the test does not apply. *Id.* at 556. While we use a seat belt everyday, few jurors know what to expect of it in a crash.

The defense will argue that is only common sense; if an ordinary consumer does not have "everyday experience" with the product in the circumstances (a crash) at issue, no one can possibly have "legitimate" expectations about a product's performance. *Id.* at 569. However, despite the defense argument, the emphasis should be on the "product user's expectation of safety," not "everyday experience."

Defects cause accidents, crashes, and personal injuries. The ordinary consumer does not, in everyday life, have accidents which cause collisions and injuries. So, by the very argument, no consumer could ever understand "safety" in a crash, collision or injury since it's not in his everyday experience. That was not the purpose of the law under *Barker v. Lull*. The purpose was to provide consum-

(Continued on page 12.)

(Consumer Expectations, continued from page 11.)
ers a forum to determine what "expectations of safety" by the product user are demanded of the manufacturers who are charged with knowing the foreseeability of accidents, collisions and personal injury. (quoting *Barker,* 20 Cal.3d at 434).

Soule gave its examples of circumstances where consumers do have everyday experience and therefore expectations: "The ordinary consumers of modern automobiles may and do expect that such vehicles will be designed so as not to explode while idling at stoplights, experience sudden steering or brake failure as they leave the dealership, or roll over and catch fire in two-mile-per-hour collisions." *Soule, supra,* at 566 n.3. Yet, while these examples are not everyday experiences, people have a basis for legitimate expectations about how the vehicle should perform. The Court avoided mentioning that the technical explanations for these happenings are in the realm of complicated engineering and design. So, what was the Supreme Court thinking?

The *Soule* Court further stated that in other cases consumers have no experience with the product in the circumstances, and so have no basis for "legitimate" expectations. In those cases, and in cases where the defect determination turns on "technical issues of feasibility, cost, practicality, risk, and benefit," then "the jury *must* consider the manufacturer's evidence of competing design considerations (citation), and the issue of design defect cannot fairly be resolved by standardless reference to the 'expectations' of an 'ordinary consumer."' 8 Cal.4th at 567 (Supreme Court's emphasis). *Soule* was such a case, the Court held.

Now, the *Soule* Court really doesn't make sense. Manufacturers, who have all the time in the world to design and test their products for safety or not sell them, are given a free pass on safety because they make compromises in their design. Yet, the user can only rely on the manufacturer for the user's safety and has no say in the compromises which may have injured him. That's a lot of trust without a remedy.

Soule further said that instructing on the consumer expectation test when ordinary consumers have no everyday experience in the circumstances, and/or when the defect determination necessarily turns on technical issues, is error:

[T]he jury may not be left free to find a violation of ordinary consumer expectations whenever it chooses. Unless the facts actually permit an inference that the product's performance did not meet the minimum safety expectations of its ordinary users, the jury must engage in the balancing of risks and benefits required by the second prong of *Barker*.

... [I]nstructions are misleading and incorrect if they allow a jury to avoid this risk-benefit analysis in a case where it is required.... [In such a case,] **the jury must be instructed solely on the alternative risk benefit theory of design defect ....**

8 Cal.4th at 568 (emphasis added).

Moreover, *Soule* holds that the consumer expectation test is inappropriate where plaintiff's defect theory requires "the jury to appreciate complex technical matters" **that an ordinary person does not know or understand without expert testimony:**

[T]his determination involves technical issues of feasibility, cost, practicality, risk, and benefit (citation) which are "impossible" to avoid (citation). In such cases, the jury must consider the manufacturer's evidence of competing design considerations (citation), and the issue of design defect cannot fairly be resolved by standardless reference to the "expectations" of an "ordinary consumer."

8 Cal.4th at 567, 570 (emphasis added). Accordingly, "when the ultimate issue of design defect calls for a careful assessment of feasibility, practicality, risk, and benefit, the case should not be resolved simply on the basis of ordinary consumer expectations." 8 Cal.4th at 562. Why does the Court suddenly shift from "product user" to "ordinary consumer?" Products are also used by sophisticated users – pilots of aircraft, for instance.

Moving on, both the *Soule* and *Barker* courts noted the "'crashworthiness" issue presented in *Self v. General Motors Corporation* (1974) 42 Cal.App.3d l). *Soule*,8 Cal.4th at 563 (citing *Barker v. Lull Engineering Co., Inc*. (1978) 20 Cal. 3d 413, 433). In *Self*, the jury was required to determine whether a design defect caused an automobile fuel tank to explode. "This, in turn, entailed concerns about whether placement of the tank in a position less vulnerable to rear end collisions, even if technically feasible, 'would have created a greater risk of injury in other, more common situations."' *Soule*, 8 Cal.4th at 563 (quoting *Barker*, 20 Cal. 3d at 433). The Supreme Court explained that, on the facts of *Self*, an instruction that precluded the "complex weighing of risks, benefits, and practical alternatives" would be misleading. 8 Cal.4th at 563 (quoting *Barker*, 20 Cal.3d at 434). Fine, but why not also the consumer expectation test? What is more basic than expecting that the fuel tank is not going to explode in a collision? It's up to the manufacturers to make sure it doesn't happen.

In my opinion, the *Soule* Court got it wrong. They forgot that the safeguard of "safety" is the consumer user's expectation of safety test, not the manufacturer's risk/benefit analysis. *Barker, supra.* For a manufacturer to avoid selling a product that isn't safe, all it has to do is not sell it. All the consumer can do, however, is trust that the product *is* safe.

While the jury makes the determination of defect, the test is the expectation of "the product user," not the expectation of the non-user jury. The jury is helped to reach

(Continued on page 13.)

(Consumer Expectations, continued from page 12.)

a verdict based only on evidence, expert opinion, proper jury instructions and argument. The *Soule* court instead placed the jury in the user's shoes and concluded the jury couldn't know what to expect because it was too complicated. Catch 22. Most jurors are not police investigators yet they decide beyond a reasonable doubt who committed the crime, relying on complicated forensics evidence. Medical malpractice claims, SEC violations, and numerous other examples also come to mind.

So, Where Is the Line?

The first part of the line is to try to educate the court and the judge as to the difference between a technical explanation as to "why" something didn't work for the product user and is defective, versus the "effect" of the defect on safety which falls within the consumer's expectation of safety. Remember, it's the user's **expectation** that is important, not the fact that a jury has to experience the same circumstances every day to then have formed a belief as to what should happen under the usually uncommon experience of a crash or injury precipitated by a defective product.

Further, the court has to be shown that there are differences between a sophisticated user and a user of a product who is unsophisticated or unknowledgeable about it. *Soule* referred to the "user" of the product. A pilot of an aircraft would be expecting the aircraft to perform in certain ways outside of the experience of the ordinary individual. However, a jury, with the assistance of expert testimony, can clearly be brought up to a level of expectation of that pilot based upon competing testimony from both sides. Just because the explanation may be technical is no reason to deny the consumer expectation test under these circumstances. If that were the case, all the defense has to argue is that the jury never used the product in a crash before, so he or she has no idea of what's going to happen. That is not the law. The expectations of the user, sophisticated or not, trumps the technical explanation criteria and should permit the consumer jury instruction.

Finally, the purpose of strict liability for design defects as expressed by *Barker* and its progeny pre-supposes that manufacturers have the time, engineers, testing and abilities to produce products that will not harm people if used in a foreseeable manner. The consumer expectation test was one form of placing the responsibility on the manufacturer to have done all things necessary to produce a product that would not injure an individual. Now, however, the courts have forgotten that basic premise.

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(President's Message, continued from page 2.)

our presiding Judge Verna Adams about the status of the current affairs of the Marin County Courts.

Earn Those Important CLE Credits

MCBA's Second Annual CLE Fair will take place on Saturday, November 14. Our first CLE Fair was a great success, with over 100 attorneys in attendance. President Elect Beth Jordan, MCBA Director Tim Chambers and those on the CLE Fair Committee are busy working on getting outstanding speakers for this event. Matt White has promised to serve as moderator for the judge's luncheon panel discussion. MCBA Director Joel Gumbiner is busy signing up sponsors for the event who include individuals and companies providing services to our MCBA members.

In addition to the CLE Fair, we have two CLE events scheduled in September – a 2 hour seminar on Insurance Bad Faith Litigation on September 10, and a 1 hour free CLE on fee arbitration on September 17.

Let's Party!

MCBA Director Tim Chambers and Woody Rowland have volunteered once again to have the MCBA Holiday Party at the offices of their law firm, Rowland & Chambers. Their holiday party keeps getting bigger and better. Thank you Rowland & Chambers for your generous offer.

For more information on these events, please check out the MCBA website at www.marinbar.org. We've even entered on our calendar the dates that our Courts are closed, as an added benefit to our MCBA members.

(Non-Compete, continued from page 4.)

the court already expressed the rule that partial restraints violate the rule against non-compete agreements and that was nearly one hundred years ago. *Edwards* doesn't make new law but it does shut the door, once and for all, on those who would seek to restrain a past or present employee from seeking employment in his or her chosen field and in their chosen geographic area.

As part of his employment, *Edwards* was required to sign an agreement which prevented him from performing work for Andersen's clients for 18 months after he left the giant accounting firm. The agreement also prevented him from soliciting clients of the firm for 12 months following his departure. Naturally, under the narrow exception rule, Andersen argued that Edwards was free to work in his chosen field and the restraint on his employment was sufficiently limited to fall within the exception. The California Supreme Court disagreed.

California has now firmly established the rule against non-compete agreements except in limited circumstances, *again*. Bear in mind, agreements that protect trade secrets remain enforceable as do agreements that restrain the employment of someone selling a business or partnership interest in a business. The *Edwards* case does nothing to limit a business' right to protect its trade secrets under Civil Code 3426, the Uniform Trade Secrets Act. Trade secrets include not only secret formulas and processes; rather, the idea of trade secret protection is broad enough to include customer lists and other data used by a business to promote itself or sell its products. When drafting employment and severance agreements, the attorney must be careful to include a restraint on the use of trade secret information without simultaneously restricting an employee's ability to be employed or limiting the employee's business prospects.

While California has now solidified the rule against non-compete and non-solicitation agreements, many other states continue to allow enforcement of broadly drafted non-compete and non-solicitation agreements. California has long ago rejected the notion that a California citizen working in the State of California could have his employment governed by the laws of another state because of a choice of law provision contained in an employment agreement. Other states deal with the issue differently. If you represent an employee who has signed an employment agreement with a choice of law provision that requires the entire agreement including the non-compete agreement to be interpreted according to the laws of a state other than California, and a dispute has arisen, you may have to race to the courthouse to obtain a ruling in California that the choice of law provision is unenforceable.

At the beginning of the twenty-first century, the court in *Armendariz v. Foundation Health Psychare Services, Inc.* (2000) 24 Cal. 4th 83, established the minimum procedural and substantive requirements that must be present for an arbitration agreement between and employee and employer to be enforceable in California. If you represent an employee that has signed an employment agreement containing a provision requiring arbitration to be conducted outside of California according to the rules and laws of another state, whether or not the agreement is valid was not made clear by the *Edwards* case. We can only hope that the courts extend the same degree of protection against non-compete and non-solicitation agreements in these situations, but that question has yet to be decided. After all, shouldn't all California employees be entitled to the same protections even when they work for companies based outside the state? Employers from other states or countries who enjoy the robust nature of our California economy should not be able to circumvent decades of legal evolution with a single clause in a contract many employees fail to read and when they do, fail to understand.

What to do? If you represent a business that has or is considering trying to implement or enforce a non-compete or non-solicitation agreement, review the agreement to determine if the client is protecting trade secrets or if it is an attempt to restrain an employee from working for a competitor or starting a competing business. Your business client may not like the news you report so be prepared. Despite the ruling in *Edwards*, non-compete and non-solicitation agreements drafted during the preceding years are still out there and employers have been sharing information with employees assuming the information was protected.

If you represent an employee, the over-reaching employer's attempt to restrain your client's employment may, in itself, be a tort worth pursuing. While you consider going on the offensive, you should take care to examine whether or not your client has or intends to use the trade secrets of his/her former employer while working for a new employer or in pursuit of their own business. If you've been contacted by the out of state employer's legal counsel, and believe a problematic arbitration clause and choice of law provision may be enforceable in the employer's home state, consider a preemptive filing seeking declaratory relief invalidating the troublesome clause.

**Steven Kesten represents employees and employers in discrimination, wrongful termination, sex harassment and wage and hour litigation throughout the San Francisco Bay area. His web site can be found at www.MarinCountyLegal.com.*

(Tax Issues, continued from page 5.)
treated as non-wage damages that will be reported to the plaintiff on a Form 1099; and (3) In cases where there's a justification for an exclusion for personal physical injuries or physical sickness, what amount is excludable from income under Section 104 with no Form 1099. It's usually a good idea to also state what amount is paid for lawyer's fees, and to separately pay it.

Regarding the potential for a Section 104 exclusion, bear in mind that it was perceived abuses in the tax treatment of employment litigation settlements that led Congress to amend Section 104 in 1996. The physical injury/sickness tax exclusion still has legs, but it shouldn't be abused.

Tax rules are complex and exactly how you document the case (and the tax reporting) is important. You and your client may need a tax specialist's help before you finalize and sign the settlement agreement. Once you decide what tax provisions are appropriate, document them in the settlement agreement. Although tax language in a settlement agreement will not bind the IRS or the courts in any subsequent tax dispute, they often will respect these terms.

Attorney Fees

The tax treatment of attorney fees is also a messy area. The Supreme Court has said the client is generally treated as receiving 100% of a recovery, even if the contingent fee lawyers are separately paid their percentage fee. You might think a client can simply deduct the contingent fee, but this is where it gets complicated.

The deductibility of legal fees depends on the type of case. In employment cases, the client can claim an above-the-line deduction. That will mean the client won't have to pay tax on their attorney fees. "Below-the-line" means itemized, going from adjusted gross income to taxable income. Although the plaintiff in an employment case can deduct the fees above the line, in other litigation, most clients can deduct the legal fees only as a miscellaneous itemized (below the line) deduction. Such deductions are subject to limitations and phase-outs, and they tend to run afoul of the alternative minimum tax (AMT). Frequently, the result is that the client cannot deduct all--or sometimes any--of the attorney fee.

Fortunately, you don't have to worry about this in exclusively personal physical injury cases (such as a serious auto accident). But there's a caveat: Before you can conclude that attorney fees won't cause any tax problems in a personal physical injury case, consider whether interest or punitive damages are being paid. These are taxable income to the client *even* in a physical injury case. Plus, the portion of the attorney fees attributable to those items is generally *also* taxable. The client may be able to deduct this amount, but that deduction may be subject to the limitations applicable to miscellaneous itemized deductions, including the AMT. Where punitive damages and interest are involved, you probably need the help of a tax specialist.

Many clients think all legal fees they pay are tax deductible. Not true. If the fees relate to their trade or business, they do get a deduction. Yet even in those cases, some legal expenses must be capitalized and written off over time. But if the legal fees are personal, they cannot be deducted. Personal legal expenses would include legal expenses of a divorce or the legal expenses of a fence dispute with your neighbor. Often, though, a legal expense that is arguably "personal" may still produce income (a recovery in a personal defamation suit, for example).

In such cases, you can usually claim a deduction for your legal fees against your recovery. Thus, the mere fact that a legal matter is non-business doesn't necessarily mean it is personal for tax purposes. Legal fees relating to investments are usually deductible, but only as miscellaneous itemized deductions, which means they are subject to limitations.

Qualified Settlement Funds

Qualified settlement funds (QSFs), also known as 468B funds, provide important tax benefits that can en-

(Continued on page 16.)

(Tax Issues, continued from page 15.)
courage settlement. Authorized by §468B of the Internal Revenue Code, these are trusts set up to resolve claims. Generally, a defendant cannot claim a tax deduction until the plaintiff actually receives funds. Yet QSFs allow defendants to claim a tax deduction currently for the full amount of the settlement in the year the case is settled, even though the plaintiffs may not receive their money for months or even years.

There are three straightforward requirements for forming a QSF. First, the trust must be subject to court supervision--a judge must approve the trust document and take jurisdiction over the funds. Any court--state, federal or even probate--will do. It need not be the court with jurisdiction over the case. Second, the trust must exist to resolve or satisfy claims--to receive money from defendants and pay plaintiffs. Third, the QSF must qualify as a trust under state law. A simple trust agreement will ensure that this requirement is met. There is great flexibility as to who can be a trustee, and lawyers and accountants often fill this role.

A QSF is most classically used in class actions, but QSFs are useful in individual cases too. The plaintiff and defendant may be negotiating a settlement but find themselves unable to agree on the tax language for the agreement. A QSF can bridge these difficulties, allowing each party to get what they want because there can be two settlement agreements.

A desire to implement structured settlements is another common reason for setting up a QSF. A QSF is an ideal place to park the money while the details of structures are worked out. QSFs are immensely flexible. They can be short term, lasting only a few weeks or a few months. In complex and large class actions, QSFs may exist for several years while payments are disbursed over time. The defendant is entitled to a tax deduction as soon as it deposits funds into the QSF, but the money is not treated as received by the plaintiffs or their lawyers until it is paid out--a great deal for both parties.

Reporting Rules

When a settlement is reached, the defendant must file Form 1099-MISC to report to the IRS the payment it makes to resolve the case. If the defendant makes payment by a traditional joint check payable to you and your client, IRS regulations require the defendant to issue one Form 1099 to you and one to your client, each for the *full* amount of the settlement. Thus, if you receive a $1 million settlement (including a legal fee of $400,000) and you disburse $600,000 to your client, you will pay tax only on your $400,000 fee. If your client also receives a Form 1099 for the full $1 million, your client will need to find a way to deduct the $400,000 fee. As discussed above, if the fee deduction is above-the-line, your client pays tax only on the $600,000 net recovery. If your client can claim only a below-the-line deduction, the numbers can get complex, but usually your client ends up paying tax on considerably more than his $600,000 net recovery.

This mode of reporting can be confusing at tax time, so I generally ask the defendant to issue two checks--one to the lawyer for the lawyer's share, and the other to the client for the client's share. The advantage of two separate payments is that you will receive a Form 1099 only for your fee. The client may still receive a Form 1099 for 100 percent of the settlement, but use this bifurcated check procedure unless there is a good reason not to.

Another concern is what Form 1099s the plaintiff lawyer must issue to others. The penalties are severe if you intentionally fail to file a required Form 1099 (10 percent of the payment you fail to report), so you should make a practice of issuing these forms when required. One of the big places the IRS looks for compliance is in payments to co-counsel. Although most payments to corporations are exempt from Form 1099 rules, that's not the case for payments to lawyers, including incorporated lawyers and law firms.

Most lawyers do not issue these forms to clients, on the theory that they are merely intermediaries, and that as lawyers they are not the "payor." The Treasury Department has promulgated some highly complex regulations applying to lawyers and other intermediaries. In general, these regulations require that you issue a Form 1099 to your client only if you exercised significant management and oversight of the funds before paying them out. Most lawyers in most cases do not.

Final Word

Our federal income tax system is the most complicated in the world, and some lawyers throw up their hands without even trying to understand the basics. That's a mistake. As a litigator, you should be sensitive to tax issues, and know when it's time to turn to a tax adviser for guidance. Often, you can do some tax planning as a case winds down to settlement. If you know some tax basics, you can help your client materially, keep yourself out of trouble, and create benefits for yourself and your firm.

**Robert W. Wood practices law with Wood & Porter in San Francisco (www.woodporter.com) and is the author of Taxation of Damage Awards and Settlement Payments (4th ed., Tax Inst. 2009) and Qualified Settlement Funds and Section 468B (Tax Inst. 2009), both available at www.taxinstitute.com. He can be reached at wood@woodporter.com. This discussion is not intended as legal advice and cannot be relied upon for any purpose without the services of a qualified professional.*

(Justice Moreno, continued from page 7.)
their diverse and varied backgrounds to the discussion.

Recognizing that a diverse background enhances the judiciary's ability, it should again not trump the judge's oath. Diversity should enhance justice and perspective for those issues that come before the court. It is Justice Moreno's opinion that diversity does not have to be seen as a negative force, but should instead be seen as a force to moderate and to ensure fairness, integrity with trust, and confidence in the justice system for all.

Justice Moreno then took several questions including the progress of his college-graduate children, and how (sadly) oral argument rarely changes the judges' preformed opinions.

Judge Moreno closed with some comments regarding his possibility of being on the short list for appointment to the United States Supreme Court. Justice Moreno said that if the call ever came, he "might be interested."

DETAILS FOR CALENDAR

Sept. 16th
Probate & Estate Planning Section Meeting
Robert Goldman, Goldman & Associates
"Emergency Estate Planning & Estate Planning for the Terminally Ill"
Tamalpais Room, San Rafael Corporate Center, 750 Lindaro, San Rafael, 12 – 1:30 pm

Sept. 17th
Real Property Section Meeting
Review of Litigation and Regulatory Responses to the Real Estate/"Sub Prime" Implosion
From lender liability suits to statutory loss mitigation and foreclosure delay requirements, nothing will ever be the same - for now.
Presented by: Spencer Scheer, Scheer Law Group, LLP
For more information and to sign up, please contact section co-chair Derek Weller at derek@derekwellerlaw.com or (415) 453-1375.
Seafood Peddler, 12 – 1:30 pm

Sept. 18th
Diversity Section Meeting TBA

Sept. 21st
Probate & Trusts Mentor Group
An informal forum to further discuss issues addressed at the monthly estate planning section meetings or any other issues. Bring your lunch and interesting estate planning/trust administration/probate issues to discuss, and snacks will be provided.
Location: 802 B Street, San Rafael, 12-1:30 pm
Parking is available in the City of San Rafael parking lot on B Street south of 4th Street.

(Spotlight, continued from page 8.)

PS: I might become the piano player at Nordstrom. Getting paid to play would be nice.

TML: Why did you join MCBA?

PS: Bryan McCarthy told me to. Once I started making the effort to meet other members at the monthly meetings, I found that the exchange of ideas among practitioners was as important to the practice as researching the law. It's as good a resource as you want it to be for getting insights on different approaches to situations, and produces some long term friendships. Everyone's really in the same boat in this practice, and isolation will dry you up. Bryan's advice was right on.

TML: Why did you become a Director?

PS: Becoming a director was an opportunity to participate first hand with the hard thinkers and positive people who want to promote the dignity of the practice of law. Three years as a director went by really fast, and hearing different points of view that I hadn't considered being expressed on the different issues, was inspiring.

TML: If you had to pick a single highlight of your career, what would it be?

PS: Just after a highly favorable jury verdict for my client was read in court and Judge Beverly Savitt discharged the jury, one juror, who did not know my client before the trial, walked up to my client and told him, "I can finally kiss you," and did. I hadn't realized how well my client had presented himself. Obviously, neither did the defense.

TML: What was the best, worst, or strangest experience in your career?

PS: The worst experience was when I represented a tenant on a cross-complaint for damages for uninhabitable premises. When the process server served the in pro per landlord, he had a heart attack and died. His heirs sued me for wrongful death based on the service of process. Judge Ira Brown sustained my demurrer without leave to amend.

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Deadline for submission of articles, ads, inserts, and announcements is the 15th of each month. Thank you.

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THE MARKETPLACE

Anyone wishing to advertise in the Marketplace should send their text ad to MCBA, 30 N. San Pedro Rd, Ste. 140, San Rafael, CA 94903 with payment of $35 per month, or you may email to: rgaspar@30nsp.org. ***The ad should be no longer than 25 words and paid in advance. For each additional word add $1.***

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to serve as a liaison to the Marin County courts,
and to educate the community and
enhance access to legal services.

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MCBA encourages submission of articles that may interest the legal community. Letters to the Editor are also welcome and may be published if space permits. Submissions will not be returned. The Editor reserves the right to publish, decline to publish, edit or otherwise modify any submission. Editorial material should be sent to the Marin County Bar Association at the above address.

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